(18,294.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 441.

GEORGE H. HIGGINS, RECEIVER OF THE KEYSTONE NATIONAL BANK OF ERIE, PLAINTIFF IN ERROR,

vs.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

	Page.
Transcript from the circuit court of the United States for the eastern district of Pennsylvania	1
Writ of error	1
Citation	1
Docket entries	2
Caption	3
Præcipe for summons	4
Summons	4
Statement of plaintiff's claim	5
Affidavit of defence	10
Rule to plead	12
Plea	12
Suggestion of record	13
Jury	13
Verdict	14
Bill of exceptions	14
Evidence for plaintiff	16
Testimony of George H. Higgins	16
Stipulation as to facts	17
Testimony of Wm. W. Hand	25

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Page

Letter, Atherton to bank, January 10, 1891 31
January 19, 1891 31
January 17, 1891 32
January 24, 1893 32
February 10, 1893 32
November 13, 1893 32
March 20, 1894 32
March 17, 1897 33
October 14, 1897 33
Testimony of Joseph I. Towne 33
Matthew Griswold 57
Edward C. Moore 61
John O. McClintock 63
George B. Delamater 76
George W. Haskins 78
George W. Delamater 85
T. Albert Delamater 95
Plaintiff closes 97
Evidence for defendant 98
Testimony of Harry J. Moore 98
John B. Gest 101
Joseph B. Richardson 105
Letter, Kepler to Atherton, April 7, 1894 107
Lamb to Atherton, April 14, 1897 107
Atherton to Griswald, April 4, 1894 108
Atherton to Lamb, April 8, 1897 108
March 20, 1897 108
Assignment, Delamater & Co., December 5, 1890 110
Certificate of stock 112
Charge of the court 113
Exceptions 120
Judge's certificate to bill of exceptions 121
Rule and reasons for new trial 122
Order taking motion for new trial under advisement 126
Opinion on motion for new trial 126
Order to enter judgment 128
Assigment of errors 128
Petition for writ of error 137
Stipulation as to record, &c. 138
Bond on writ of error 139
Clerk's certificate 140
Hearing and submission 141
Opinion 141
Judgment 144
Order for mandate 145
Mandate 145
Petition in error 146
Assignment of errors 149
Bond for costs 159
Writ of error 160
Citation and service 160
Clerk's certificate 161

UNITED STATES OF AMERICA, *ss.* (1)

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between George H. Higgins, Receiver of the Keystone National Bank, plaintiff, and The Fidelity Insurance, Trust & Safe Deposit Company, defendant, a manifest error hath happened, to the great damage of the said George H. Higgins, Receiver, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United State should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 4th day of January, in the year of our Lord one thousand nine hundred and one.

SAMUEL BELL,
Clerk of the Circuit Court of the United States.

Allowed
By the Court.

UNITED STATES OF AMERICA, *ss.* (2)

THE PRESIDENT OF THE UNITED STATES,

To Fidelity Insurance, Trust & Safe Deposit Company, Defendant, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United

States, Eastern District of Pennsylvania, wherein George H. Higgins, Receiver, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. McPherson, Judge, holding Circuit Court of the United States, this 4th day of January, in the year of our Lord one thousand nine hundred and one.

JOHN B. McPHERSON, J.
By G. B., Jr.

Service accepted,
R. C. DALE,
Attorney for Defendant.

---

(3) April Session, 1899.

ASSUMPSIT.

Asa W. Waters. FRANK M. HAYES, Receiver of The Keystone National Bank of Erie.

6 *vs.*

R. C. Dale. THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

1899, March 21. Praecipe for summons filed. Summons exit returnable first Monday of April next.

1899, March 21. Plaintiff's statement of claim filed.

1899, March 22. Summons returned, service accepted, with copy of plaintiff's statement, and R. C. Dale, Esq., appears for defendant.

1899, March 28. Affidavit of defence filed.

1899, March 29. Rule to plead filed.

1899, April 6. Plea filed.

1900, March 5. Suggestion of the resignation of Frank M. Hayes as Receiver of the Keystone National Bank of Erie, and the appointment of George H. Higgins as Receiver, filed.

1900, June 18. Depositions on behalf of plaintiff filed.

1900, June 29. Depositions on behalf of plaintiff filed.

1900, October 16. Stipulation as to admitted facts filed.

1900, October 16. And now, to wit: A jury being called come, to wit: (see minutes).

1900, October 17. And the jurors aforesaid, upon their oaths and (4)
affirmations, respectively do say that they find for defendant.

1900, October 20. Rule for new trial filed.

1900, December 3. Argued sur motion for new trial.

1900, December 7. Opinion refusing new trial.

1900, December 24. Praecipe for judgment on the verdict filed. Judgment accordingly.

1900, December 24. Bill of exceptions sealed and filed.

1900, December 24. Assignments of error filed.

1900, December 24. Stipulation as to record filed.

1900, December 24. Petition for writ of error allowed and filed.

1900, December 24. Bond sur writ of error approved and filed.

1901, January 4. Writ of error issued, and copy thereof lodged in Clerk's office for adverse party.

1901, January 4. Citation allowed and issued.

1901, January 7. Citation returned. Service accepted.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN (5)
AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

April Session, 1899. No. 6.

GEORGE H. HIGGINS, Receiver,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO.

Pleas and proceedings before the Honorable the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit of April Session, 1899, No. 6; it is thus contained:

Be it remembered: That on the 21st of March, 1899, the plaintiff, by his counsel, comes into our Court here and sues forth a writ of summons, which, with the endorsement returned thereto, is in the words and figures following, to wit:

(6) IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY, Defendant.

April Sessions, 1899. No. 6.

IN ASSUMPSIT.

PRAECIPE.

Issue summons in assumpsit, returnable sec. leg.

Asa W. Waters, Attorney for Plaintiff. March 21, 1899.

Endorsed: No. 6, April Sessions, '99. U. S. C. C., E. D. of Pa. In Assumpsit. Frank M. Hayes, Receiver of the Keystone National Bank of Erie, vs. The Fidelity Insurance, Trust & Safe Deposit Company.

PRAECIPE.

Filed March 21, 1899. Samuel Bell, Clerk, per G. B., Jr. Asa W. Waters, Attorney for Plaintiff.

---

(7) UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA. } *sct.*

THE PRESIDENT OF THE UNITED STATES,

To the Marshal of the Eastern District of Pennsylvania, greeting:

We command you, that you summon The Fidelity Insurance, Trust & Safe Deposit Company, late of your District, if it may be found therein, so that it be and appear before the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, at a session of the same Court to be holden at Philadelphia, on the first Monday of April next, to answer to Frank M. Hayes, Receiver of The Keystone National Bank of Erie, in an action in assumpsit. And have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 21st day of March, A. D. 1899, and in the 123d year of the Independence of the United States.

[Seal.]

SAMUEL BELL,
Clerk of Circuit Court, U. S.
per Brodbeck.

Service of within summons, in re, Hayes, Receiver, vs. The Fidel- (8)
ity Insurance, Trust & Safe Deposit Company, is accepted, and the receipt of a copy of Plaintiff's Statement of Claim is admitted, and appearance is entered for defendant, this 22d day of March, 1899.

R. C. DALE.

Endorsed: No. 6. Circuit Court, April Session, 1899. Frank M. Hayes, Receiver of The Keystone National Bank of Erie vs. The Fidelity Insurance, Trust & Safe Deposit Company. Summons in Assumpsit. Filed Mar. 22, 1899. Samuel Bell, Clerk, H. R. Returnable on the first Monday of April next. Asa W. Waters, Attorney for Plaintiff.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT (9)
COMPANY, Defendant.

IN ASSUMPSIT.

April Sessions, 1899. No. 6.

STATEMENT OF PLAINTIFF'S CLAIM.

The Keystone National Bank of Erie, located in the City of Erie, in the State of Pennsylvania, was duly incorporated and organized, and prior to June 29, 1897, transacted a banking business under the laws of the United States as a national banking association; but on said last named day failed and suspended payment of its obligations, and was, therefore, by order of the Comptroller of the Currency of the

United States, declared insolvent, and thereafter, on July 26, 1897, the said Frank M. Hayes was duly appointed by said Comptroller of the Currency receiver thereof, and was duly qualified as such and is now administering the duties of his trust, and as such receiver brings this action.

(10) That there is due and owing by said The Keystone National Bank of Erie, contracts, debts and engagements to its creditors which the assets and credits of said banking association are wholly insufficient to pay and discharge, and it has become necessary, in order to pay and discharge said contracts, debts and engagements, to enforce the liability of the stockholders of the capital stock of said The Keystone National Bank of Erie, as provided by sections 5151 and 5234 of the Revised Statutes of the United States; that, therefore, the said Comptroller of the Currency, who is by law charged with that duty, after having ascertained, determined and decided that in order to pay said contracts, debts and engagements of said banking association, an assessment of one hundred per centum (100%) upon the par value of each share of the capital stock of said The Keystone National Bank of Erie, was necessary, made an order to that effect in writing directed to the plaintiff herein, making said assessment payable on or before December 3, 1897, and pursuant to said order the plaintiff notified each and every shareholder, including said defendant, and demanded payment thereof.

That the capital stock of said banking association is one hundred and fifty thousand dollars ($150,000) divided into fifteen hundred (1,500) shares, of the par value of one hundred dollars ($100) each; that the capital stock of said banking association was originally two
(11) hundred and fifty thousand dollars ($250,000) divided into twenty-five hundred (2,500) shares of the par value of one hundred dollars ($100) dollars each, and so continued from the date of its organization, October 19, 1864, until in or about the year 1892, when, by order of said Comptroller of the Currency, an assessment was made upon its stockholders of twenty-five per centum of the par value of each and every share; that said last named assessment was duly paid; that said banking association, at the time of said last named assessment, owned five hundred (500) shares of its own capital stock, of the aggregate par value of fifty thousand dollars ($50,000), which it had acquired ownership of by transfer as security for indebtedness to it, not otherwise good; that the original capital and credit of said banking association was impaired, and by consent of the Comptroller of the Currency, after the payment of said last named assessment of twenty-five dollars ($25) per share, the capital stock of said banking association was reduced to one hundred and fifty thousand dollars ($150,000), and it was allowed by said Comptroller of the Currency to cancel the five hundred (500) shares, of the aggregate par value of fifty thousand

dollars ($50,000) of the capital stock owned by it, and the holders of the remaining two thousand (2,000) shares voted, at a meeting of the stockholders, to reduce the holding of each twenty-five per cent. (25%), and by consent of said Comptroller of the Currency this was done, and the entire issue of twenty-five hundred (2,500) shares was either cancelled or surrendered, and a new issue made in lieu of the (12)
two thousand five hundred (2,500) shares, of fifteen hundred (1,500) shares of the par value of one hundred dollars ($100) each; and thereafter, upon approval of the said Comptroller of the Currency, the capital stock of said banking association became, as hereinbefore stated, one hundred and fifty thousand dollars ($150,000), and so continued without change, and was such at the date of its suspension and failure on June 29, 1897.

Plaintiff says that long prior to the date of the reduction in the capital stock of said banking association, hereinbefore mentioned, said defendant, The Fidelity Insurance, Trust & Safe Deposit Company, a corporation duly incorporated, organized and doing a banking business under and by virtue of the laws of the State of Pennsylvania, with a principal office in the City of Philadelphia, became the owner of two hundred and thirty (230) shares of the capital stock of said The Keystone National Bank of Erie, and surrendered the certificates (duly endorsed for transfer on the back thereof, in blank, however, as to transferee), therefor to said The Keystone National Bank of Erie, and requested that new certificates be issued to one W. W. Hand, an agent, of said defendant; said shares of stock having been theretofore registered in the names of George B. Delamater and G. W. Delamater; that new certificates were duly issued as requested; that on or about September 16, 1892, the said defendant, The Fidelity Insurance, Trust and Safe Deposit Company, paid the assessment ordered by the said Comptroller of the Currency, as aforesaid, of (13)
twenty-five per cent. (25%) on the par value of said two hundred and thirty (230) shares of capital stock of said banking association, amounting to five thousand seven hundred and fifty dollars ($5,750), and afterward, on January 24, 1893, surrendered the certificates for two hundred and thirty (230) shares of stock issued as aforesaid at its request in the name of W. W. Hand, and accepted a new certificate for one hundred and seventy-two and one half (172½) shares, being a reduction of twenty-five per cent. (25%) of its former holding, in accordance with a resolution of the stockholders of said banking association, assented to by it, passed December 2, 1892. The said last named certificate for one hundred and seventy-two and one-half (172½) shares of new stock (being shares of the capital stock of said banking association as reduced to one hundred and fifty thousand dollars ($150,000) as voted by the stockholders of said association, including the said defendant, and sanctioned by the said Comptroller

of the Currency), is now and has ever since been held and owned by said defendant.

Plaintiff says that the said one hundred and seventy-two and one-half (172½) shares of the capital stock of the said The Keystone National Bank of Erie, of the par value of one hundred dollars ($100) per share now stand upon the books of said banking association, in the
(14) name of W. W. Hand at the request of said defendant, but says that the real owner and holder thereof is the said defendant, The Fidelity Insurance, Trust & Safe Deposit Company, and that said defendant has always held said stock certificate issued as aforesaid, at its request in the name of W. W. Hand, so endorsed that it was in its power to have the same registered in its own name at any time; that said defendant notified said The Keystone National Bank of Erie, in writing, that it held and owned the one hundred and seventy-two and one-half (172½) shares of its capital stock, standing by its request in the name of W. W. Hand, both before and at or about the time of the reduction in the amount of capital stock of said banking association, and the issue to said defendant of the new certificate for the reduced number of shares as aforesaid, and such written notices were duly filed with the records of said banking association; that thereupon any and all dividends declared by said The Keystone National Bank of Erie were paid for the benefit and use of said defendant, and the receipt thereof was duly acknowledged by said defendant, and said The Keystone National Bank of Erie recognized no other owner of said shares of stock than said defendant, and represented to its creditors, whenever an occasion was presented, that said defendant was the real owned of said one hundred and seventy-two and one-half (172½) shares of its capital stock, and that the said W. W. Hand stood only as agent for
(15) said defendant in the holding of the same; and plaintiff says that credit was given said banking association on account of said defendant's ownership of said stock, and contracts, debts and engagements owing to its creditors, which the assets and credits of said banking association are wholly insufficient to pay and discharge, were created upon the liability of said defendant as a stockholder of said banking association, as provided by sections 5151 and 5234 of the Revised Statutes of the United States; and says that the said defendant, The Fidelity Insurance, Trust & Safe Deposit Company, is owner and holder for the purposes of said assessment of the Comptroller of the Currency of the United States, payable December 3, 1897, for one hundred dollars ($100) upon each and every share of the capital stock of said banking association, of one hundred and seventy-two and one-half (172½) shares of the capital stock of said The Keystone National Bank of Erie; and says that the said defendant is obligated and liable under the laws of the United States to pay said last named assessment of one hundred per centum, or seventeen thousand two hun-

dred and fifty dollars ($17,250) with interest thereon at six per (16)
centum (6%) per annum from December 3, 1897, the date the same is payable by order of the Comptroller of the Currency of the United States; and that said defendant, though often requested, has utterly neglected and refused to pay said seventeen thousand two hundred and fifty dollars ($17,250) or any part thereof; and plaintiff says that as such receiver it is his duty, under direction of the Comptroller of the Currency of the United States, to proceed to the collection of said assessment; and says the defendant, The Fidelity Insurance, Trust & Safe Deposit Company, is indebted to him as aforesaid for the purposes aforesaid in the sum of seventeen thousand two hundred and fifty dollars ($17,250), with interest thereon at six per centum (6%) per annum (as damages for the detention thereof) from December 3, 1897; and therefore he brings this action, and for the said sum of seventeen thousand two hundred and fifty dollars ($17,250) and interest thereon, as aforesaid, he asks judgment with costs.

ASA W. WATERS,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA, }
COUNTY OF ERIE. } ss.

Frank M. Hayes, being first duly sworn according to law, deposes and says that he is Receiver of The Keystone National Bank of Erie, by appointment of the Comptroller of the Currency of the United States, and as such is plaintiff in the above-named action and that the facts set forth in the foregoing statement are true to the best of his knowledge, information and belief.

FRANK M. HAYES.

Sworn to and subscribed before (17)
me, this 20th day of March, A. D.
1899.

C. B. HAYES,
[Seal.] Notary Public.

Endorsed: No. 6, April Sess. 1899. U. S. C. C., E. D. of Pa. In Assumpsit. Frank M. Hayes, Receiver of The Keystone National Bank of Erie, vs. The Fidelity Insurance, Trust & Safe Deposit Company. Statement of Plaintiff's Claim. Asa W. Waters, Attorney for Plaintiff. Filed March 21, 1899, Samuel Bell, Clerk, per G. B., Jr.

(18) IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY, Defendant.

IN ASSUMPSIT.

April Sessions, 1899. No. 6.

AFFIDAVIT OF DEFENCE.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } *ss.*

Charles Atherton, being duly sworn according to law, doth depose and say: I am the vice-president of The Fidelity Insurance, Trust & Safe Deposit Company, the defendant named in the above entitled cause, and that the defendant has a full, just and complete defence to the whole of the plaintiff's claim of the following nature and character, to wit:

That it is not true, as averred in the statement of plaintiff's demand, that the defendant was at the date therein stated, or any other time, the owner of two hundred and thirty (230) shares of the capital stock of said Keystone National Bank of Erie, or of any shares in said bank. A true statement of the facts relating to the certificate for two
(19) hundred and thirty (230) shares of said stock mentioned in plaintiff's statement of demand is as follows:

On or about March 1st, 1889, The Fidelity Insurance, Trust and Safe Deposit Company loaned to the firm of Delamater & Company the sum of fifteen thousand dollars ($15,000); said indebtedness is represented by an obligation of Delamater & Company which bears date November 15, 1890, payable sixty (60) days after date, and for which the said Delamater & Company deposited with the defendants as collateral security two hundred and thirty (230) shares of The Keystone National Bank of Erie, in the names of Geo. B. Delamater and G. W. Delamater. Accompanying said certificates was a power of attorney to transfer the same, executed by the owners thereof. The said firm of Delamater & Company has never paid to the defendant

the money which by this obligation as aforesaid it was liable to pay, and the Fidelity Insurance, Trust and Safe Deposit Company, holding the certificates in the name of the original owners as collateral, caused them, for better security, to be transferred into the name of one W. W. Hand, who is a clerk in the office of said defendant; but by said transfer no title to said shares, as owner, became vested in the defendant, but the said defendant continued to hold the certificates of the shares so transferred into the name of the said Hand solely as collateral for the payment of the before-mentioned obligation of Delamater (20)
& Company, and as collateral as aforesaid the defendant still holds the certificates for said shares.

That it is true that an assessment of twenty-five per cent. (25%) was paid upon said shares, but said assessment was not paid by The Fidelity Insurance, Trust and Safe Deposit Company, as the owner therof; but the amount of said assessment was advanced by The Fidelity Insurance, Trust and Safe Deposit Comjany as the holder of said shares as collateral for the account of Delamater & Company, for whose indebtedness to said defendant said shares were held.

And this defendant denies that the certificate for one hundred and seventy-two an one-half (172½) shares of the said Keystone National Bank of Erie, now standing in the name of W. W. Hand, is the property of the defendant, or that the defendant is the owner thereof; but, on the contrary, this defendant avers that the same is held solely and only as collateral for the indebtedness of Delamater & Company as aforesaid.

And this defendant denies that it ever at any time notified The Keystone National Bank of Erie that it was the owner of said shares, or said certificate in the sense that said defendant held title thereto as distinguished from holding the same as collateral security for the (21)
obligations of Delamater & Company.

Wherefore this deponent doth deny that under the statutes of the United States, in such case made and provided, said defendant is under any liability to make payment of the claim of the plaintiff in this action. All of which foregoing facts this deponent avers and believes to be true, and expects to prove at the trial of this cause if any there be.

CHAS. ATHERTON.

Sworn and subscribed before me
this 27th day of March, 1899.

W. C. HARRIS,
Notary Public.

Endorsed: No. 6. U. S. C. C. April Sess. 1899. Hayes, Receiver, vs. Fidelity Ins., Trust & Safe Deposit Co. Affidavit of Defence; filed March 28, 1899. Samuel Bell, Clerk, per R. R. C. Dale.

(22) IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY, Defendant.

IN ASSUMPSIT.

April Session, 1899. No. 6.

RULE TO PLEAD.

To the Clerk of the above named Court:

Please enter rule on defendant to plead in eight (8) days, or judgment sec. reg.

ASA W. WATERS,
Attorney for Plaintiff.

March 29, 1899.

Endorsed: No. 6, April Sess. 1899. U. S. C. C., E. D. of Pa. In Assumpsit. Frank M. Hayes, Receiver of The Keystone National Bank of Erie, vs. The Fidelity Insurance, Trust & Safe Deposit Company. Rule to Plead. Asa W. Waters, attorney for plaintiff. Filed Mar. 29, 1899. Samuel Bell Clerk, per R.

(23) FRANK M. HAYES, Receiver of The Keystone National Bank of Erie,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY.

U. S. C. C. April Session, 1899. No. 6.

The defendant in the above entitled case pleads non-as-sumpsit.

RICHARD C. DALE,
Attorney for Defendant.

To the Clerk of the U. S. C. C.

Endorsed: No. 6, U. S. C. C. April Session, 1899. Hayes, Receiver, v. Fidelity Ins., T. & S. D. Co. Plea. Filed April 6, 1899; Samuel Bell, Clerk. R. C. Dale.

IN THE CIRCUIT COURT OF THE UNITED STATES IN (24)
AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Pa., Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY, Defendant.

April Session, 1899. No. 6.

IN ASSUMPSIT.

And now, to wit, this — day of March, A. D. 1900, it is suggested of record that said Frank M. Hayes, the above named plaintiff, since the commencement of the above entitled cause, has resigned the receivership of said The Keystone National Bank of Erie, and that George H. Higgins, of the City of Erie, in the State of Pennsylvania, has been duly appointed, commissioned and qualified by the Comptroller of the Currency of the United States, under the laws thereof, receiver of said The Keystone National Bank of Erie in place of the said Frank M. Hayes, with all the powers, duties and responsibilities given to or imposed upon a receiver, under the provisions of the Re- (25)
vised Statutes of the United States which authorize the appointment of a receiver, and the said George H. Higgins is hereby substituted as the successor of said Frank M. Hayes as receiver of said bank as plaintiff in the above entitled action.

ASA W. WATERS,
For Plaintiff.

Endorsed: No. 6. April Sess. 1899. U. S. C. C., E. D. of Pa. In Assumpsit. Frank M. Hayes, Receiver of The Keystone National Bank of Erie, Pa., vs. The Fidelity Insurance, Trust and Safe Deposit Company. Suggestion of Record; filed Mar. 5, 1900. Samuel Bell, Clerk, per R. Asa W. Waters, W. H. Addicks, attorneys for plaintiff.

And afterwards, to wit: on the 16th of October, 1900, the jury (26)
being called, come, to wit: Milton Kurtz, John P. Huber, Henry A. Fry, Jesse S. Krebel, James L. Parrington, Freeman Gerberich, W. T. Atkins, Lewis C. Moses, H. Morgan Ruth, Jos. W. Einstein, Joseph Barnett, Philip Quillman, who are duly empanelled, returned, chosen, tried and sworn or affirmed to speak the truth, etc., in the issue joined in this case.

And afterwards, to wit: on the 17th day of October, 1900, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively, do say that they find for the defendant.

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(27) IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Pennsylvania, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY, Defendant.

April Session, 1899. No. 6.

IN ASSUMPSIT.

Be it remembered, That in the said term of April Session, 1899, came the said plaintiff into the said Court and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit: at a session of the court held at Philadelphia, in the District aforesaid, before the Honorable John B. McPherson, a Judge of the said Court, the sixteenth day of October, 1900, the aforesaid issue between the said parties came to be tried by a jury of the said District for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury
(28) aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff and said defendant stated to the Court that a stipulation and agreement had been signed as to proof of the incorporation of said The Keystone National Bank of Erie, Pa., etc., etc., which stipulation as agreed to is fully set forth herein; and thereupon counsel for said plaintiff offered the witnesses, books and papers in manner and form as herein set forth, and did then and there except to the rulings of the Court, make the admissions, and rest as herein set forth. And thereupon counsel for said defendant, after moving for nonsuit, which mo-

tion was overruled by the Court, offered the witnesses, books and papers in manner and form as herein set forth; and did then and there except to the rulings of the Court, make the admissions, and rest as herein set forth. The testimony was then closed and the Court proceeded to charge the jury as fully set forth herein; that thereupon, before the charge was given by said Court to the jury, counsel for the plaintiff requested the Court to instruct the jury upon five points referred to herein as the first, second, third, fourth and fifth points of charge for plaintiff, presented to the Court in writing, as fully set forth herein; and each one and all of said points of charge, so requested by counsel, were then and there refused, and thereupon counsel for the said plaintiff did then and there separately except to the refusal of the Court to charge each of said five points, as the same were refused, (29) and the exceptions to each point of charge so refused by the Court were then and there noted for the plaintiff; and thereupon, before the charge was given by said Court to the jury, counsel for the said defendant requested said Court in writing to instruct the jury upon six points referred to and fully set forth herein as the first, second, third, fourth, fifth and sixth points of charge for defendant; that said Court affirmed the first, second and third points as requested by counsel for said defendant; thereupon counsel for said plaintiff did then and there except separately to the giving by said Court to the jury of each of said first, second and third points; and said Court reserved the said sixth point and to the answer by the Court counsel for said plaintiff excepted, and to the answers thereto and the giving of the instruction therein to the jury; the said Court then and there noted exceptions for the plaintiff, and thereupon the Court charged the jury as herein set forth, and counsel for the plaintiff did then and there except to all of that part of the general charge, to wit: that the only question in the case is one of fact; that the burden of proof is on the plaintiff as to the beneficial ownership of the 172½ shares registered on the books of the bank in the name of W. W. Hand, and that portion of the general charge in which the Court deals with the matter of the right of said defendant to put the stock in the name of W. W. Hand without the (30) knowledge, consent or ratification of the pledgors or their assignees.

(31) IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

HAYES, Receiver,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY.

April Term, 1899. No. 6.

Philadelphia, Pa., Tuesday, October 16, 1900.

Before Hon. John B. McPherson, J., and a Jury.

Present: Asa W. Waters, Esq., John G. Johnson, Esq., for plaintiff; Richard C. Dale, Esq., for defendant.

PLAINTIFF'S EVIDENCE.

Mr. Johnson: I offer in evidence certificate dated February 1, 1893, of The Keystone National Bank of Erie, Pennsylvania, No. 236, for 172½ shares of stock, in the name of W. W. Hand; and endorsement on the back, dated February 10, 1893, "W. W. Hand," witnessed by Harry J. Moore.

GEORGE H. HIGGINS, Sworn.

By Mr. Johnson:

Q. Where do you live?

A. Erie, Pa.

Q. What is your business?

(32) A. I practice law by profession. I am receiver of the Keystone National Bank.

Q. When did you become receiver of the Keystone National Bank?

A. In April, 1899; I think the 17th.

Q. This is a certificate of your appointment, is it not? (Paper shown witness.)

A. A certified copy of it; yes, sir.

Q. You succeeded as receiver some one else, did you not?

A. I did.

Mr. Johnson: There is a stipulation in this case as to certain facts, which I will now read and place upon the record:

"It is hereby stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant in the above entitled cause, that the said The Keystone National Bank of Erie, Pennsylvania, was duly incorporated and organized for transacting the business of banking under the Act of Congress entitled 'An Act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof,' approved June 3, 1864; that the capital stock of said bank was originally $150,000; that the said organization certificate is dated October 7th, 1864, and that the capital stock of said bank was increased by approval of the Comptroller of the Currency on June 14, 1865, to $250,000, (83) divided into 2,500 shares of $100 each.

"That it was duly authorized by the Comptroller of the Currency on October 19, 1864, to commence the business of banking; that on October 3, 1884, the said bank's corporate existence was extended by order of the Comptroller of the Currency to October 7, 1904; that said bank continued in the banking business from its organization in the said City of Erie, in the State of Pennsylvania, with the capital as aforesaid, until on or about December 22, 1892, when, upon certificate of the cashier, the capital stock of said bank, in accordance with the provisions of Section 5143, Revised Statutes of the United States, was reduced from $250,000 to $150,000, divided into 1,500 shares of $100 each, by order of the Comptroller of the Currency; that prior thereto, by order of the Comptroller of the Currency, dated March 16, 1892, it appearing to the satisfaction of the Comptroller that the capital stock of said The Keystone National Bank of Erie, Pennsylvania, had become impaired to an extent which makes necessary an assessment of $62,500 upon the shareholders of said association to make good such deficiency, such assessment of 25% of its then capital stock of $250,000 was ordered by the Comptroller of the Currency, under the provisions of Section 5205 of the Revised Statutes of the United States, the said order of the Comptroller making such assessment ante- (84) dating the reduction of the capital stock to $150,000 as aforesaid. That afterward the Comptroller of the Currency, being satisfied that the said bank was insolvent and unable to pay its just and legal debts, did on July 26, 1897, appoint Frank M. Hayes receiver of said bank with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States; that said receiver duly qualified as such and administered upon said trust until on or about April 17, 1899, when he resigned, and George H. Higgins was appointed receiver of said bank by the Comptroller of the Currency, to take effect on the 17th of April, 1899, in place of said Frank M. Hayes, with all the powers, duties and responsibilities given to or imposed upon a receiver, under the pro-

visions of the Revised Statutes of the United States, which authorize the appointment of a receiver; that prior to the appointment of said Higgins as the successor to the said Hayes, resigned, as receiver of said bank, the Comptroller of the Currency, under date of November 3, 1897, did make an order in writing directed to the said Frank M. Hayes, as then receiver of said bank, in words as follows:

" 'Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of the Keystone National Bank of Erie, Pennsylvania, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the
(35) debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States.

" 'Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said The Keystone National Bank of Erie for one hundred and fifty thousand dollars, to be paid by them ratably on or before the third day of December, 1897; and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Frank M. Hayes, the receiver heretofore appointed, to take all necessary proceedings by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.'

"That prior to the appointment of the said Hayes as receiver on July 26, 1897, to wit: on June 29, 1897, the said bank had closed its doors to business by order of the Comptroller of the Currency, and a National bank examiner was then put in charge of its effects.

"The said George H. Higgins was duly qualified as receiver of said bank on or about April 17, 1899, and ever since has been administering upon the assets of said bank as its receiver, and has been substituted in this action in place of said Frank M. Hayes as the receiver of said bank, and plaintiff herein, and is prosecuting the same as such receiver by direction of the Comptroller of the Currency.

"It is further stipulated and agreed by the parties hereto that the said The Keystone National Bank of Erie, Pennsylvania, after the re-
(36) duction of its capital stock in the year 1892 to $150,000, continued the banking business in said City of Erie, Pennsylvania, until its doors were closed to business on June 29, 1897; and the assessment of $62,500 ordered by the Comptroller of the Currency to restore its then impaired capital was duly paid in said year 1892 by or in behalf of the bank's then shareholders."

That is signed by the attorneys.

I now offer in evidence the call or notice dated Erie, Pa., November 3, 1897, by Frank M. Hayes, receiver of the Keystone National Bank of Erie, Pa., to the Fidelity Insurance, Trust and Safe Deposit Company, 325 Chestnut street, Philadelphia, Pa., calling on them to pay the assessment on 172½ shares of stock owned by them.

Mr. Dale, at the same time, in producing that under call, produced a similar notice, of the same date, to W. W. Hand, which I do not offer in evidence, but give him the benefit of the fact that he produced it.

Mr. Dale: I object to the offer of one without the other. They were served together and relate to the same shares.

The Court: There is nothing yet to show that this stock belongs to the Fidelity Company.

Mr. Johnson: I will follow that up. That is in connection with the proof that we will produce that the Fidelity Company was the owner (37) of the stock.

The Court: This notice at present does not seem to have any connection with the stock. The certificate in evidence is in the name of someone else.

Mr. Johnson: I will withdraw that offer for the present, and will renew it at a later period.

By Mr. Johnson:

Q. Did you come into possession of all the books connected with the stock, and stockholding, and certificates, of the Keystone National Bank when you became receiver?

A. I did.

Q. Do you have them there?

A. I have.

Q. What are those books?

A. I have two books of certificates of stock, and two stock ledgers. I have two books of certificates of stock, the blank certificates, and some of the old ones that have been returned and reissued are pasted in.

Q. Have you there the stock register?

A. Two stock ledgers.

Q. Were those all the books pertaining to the stock holdings that you had?

A. Yes.

Q. Please turn to the books and show us what appears there with (38) regard to certificate No. 236?

A. I have the book which shows the stub of stock certificate No. 236, issued for 172½ shares of stock.

Mr. Johnson: I offer the books in evidence.

Q. Now if you will read from them.

A. Certificate No. 236, for 172½ shares, issued to W. W. Hand, dated February 1, 1893; and in pencil memorandum at the bottom of the stub is the following: "Sent by registered mail, 2-7-93," and also a memorandum of identification.

Q. Now get the other book.

A. I have the stock ledger in which the account of this stock appears.

Q. Let us have what is there.

A. On page 96 of the stock ledger, written in ink: "1891—W. W. Hand, February 1, 1893, 25 per cent. assessment, $5,750. New stock, $17,250. Total, $23,000." On the credit side of the ledger is "1891—January 15, 230 shares of stock, $23,000. Total, $23,000." In pencil memorandum—

Mr. Dale: I object to the offer of the pencil memorandum.

Q. Was that book in the condition it is now handed over to you by your predecessor receiver?

A. Yes.

Q. Have any alterations been made by you in it since?

A. None whatever.

(39) Mr. Johnson: I renew and press the offer of that memorandum.

Mr. Dale: I object to the offer of the memorandum which is in pencil. At the top of the page in pencil are these words: "Fidelity Trust and Safe Deposit Company, Philadelphia." I object to that upon the ground that a pencil memorandum, entered upon the stock ledger of a corporation, over the name of the person who purports to be the registered stockholder, is not evidence tending to show that the person or corporation named in the pencil memorandum as the Fidelity Company—even though the receiver of that bank may with entire correctness testify that the book was in that condition when it came into his possession—it is something which does not tend to show anything binding on us.

Mr. Johnson: All I have to show is that the books came from the proper custody, and having shown that, whatever the books bear upon their face, to the extent they are evidence, is evidence. It is not like the producing of a contract which emanated from some other person. I am producing our own books, and producing them just as the custodian receives them.

The Court: What effect do you say should be given to the pencil memorandums?

(40) Mr. Johnson: Whatever effect would appear from that entry upon the book.

The Court: What particular inference are you seeking to draw from it?

Mr. Johnson: To show that, upon the books, appeared the interest of the Fidelity Company in that stock; that in connection with the name of Hand was also that of the Fidelity Company, and that there was not an unequivocal admission on our books of W. W. Hand without an interest in someone else.

The Court: I understand the purpose of the offer is to show the Fidelity Company's title to the stock.

Mr. Johnson: It is for the purpose of showing exactly what our books declare with reference to the stock and the Fidelity Company's connection with it.

The Court: It is on that point, and you intend to draw the inference, in part from this memorandum, that the Fidelity Company is the owner of the stock.

Mr. Johnson: I do not think I could do that, but I do want to exclude the inference that upon our books we made an unequivocal admission that no one but Hand was interested in it. There is a difference between that and my adducing from it affirmative ownership—that I am going to prove in a different way—and when I offer my books I offer them for the purpose of having them go for whatever is on them.

Mr. Dale: I object to the offer of that entry upon the ground that (41) entries in the books of the corporation, per se, are not evidence to establish the fact that any particular person is a stockholder. There may be entries in the books, and if it be shown that the person charged as a stockholder has had either direct or inferential notice, then the entry may be admissible. It may be competent to show the stub entry book, or their stock ledger, but only entries in the stock ledger which are directly pertinent to that which appears upon the certificate itself are competent evidence. Entries in the corporation books as such do not bind the stockholders. Therefore, having called for the certificate in the name of W. W. Hand, they produce a stock ledger, and entries kept in the regular course of business; part of the regular chain of entries relating to that certificate I do not object to; but when there simply appears on that page a pencil memorandum which is no proper part of the chain of entries, then I do object to it—I do not know what inference will be sought to be drawn from it—but I object to it as something which we in no sense could be chargeable with.

The Court: For the present we will exclude this memorandum, with liberty to the plaintiff to renew the offer at a future stage of the case.

Mr. Johnson: What does your Honor do with the books themselves?

(42) They have been offered in evidence without objection, and I was having him read from them.

Mr. Dale: When a book is offered in evidence every entry which is part of the book as regularly kept is admitted.

Mr. Johnson: All I want is that the record shall cut down or limit the admission of the books, so that I may have my record straight.

The Court: I exclude this testimony for the present, because I do not yet see any sufficient connection to make this entry evidence against the defendant. The mere fact that the name of the Fidelity Company is on this page is not sufficient to show that it is the owner of the stock. Non constat, if for some reason some notice was to be sent to them, they might have been trustees of this stock, or there might be other reasons why the entry is there. Later in the case it may become pertinent evidence. In the present state of the proof we will exclude this memorandum.

(Exception noted for plaintiff.)

Q. Have you now produced all the stock books or books bearing upon the stock?

A. No, sir. I have the book here from which the original stock was issued.

(43) Q. Let us have that. I want to trace the title of these 172½ shares from the 230.

A. The 172½ shares of stock was issued in place of three certificates, Nos. 180, 181 and 183.

Q. They would aggregate what?

A. 230 shares.

Q. Standing in what name?

A. Standing in the name of W. W. Hand.

Q. Now let us have the original stubs.

A. "Keystone National Bank, certificate No. 180, for 100 shares, issued to W. W. Hand, dated January 15, 1891," and printed on this is "Received this certificate," and underneath is written: "Sent to the Fidelity Insurance, Trust and Safe Deposit Company, Philadelphia, 1-17-91."

"Certificate No. 181, for 100 shares, issued to W. W. Hand, dated January 15, 1891." "Received this certificate." "Sent to the Fidelity Insurance, Trust and Safe Deposit Company, 1-17-91.".

"Certificate No. 183, for 30 shares, issued to W. W. Hand, dated January 15, 1891." "Received this certificate." "Sent to the Fidelity Insurance, Trust and Safe Deposit Company, Philadelphia, 1-17-91."

Q. Of course the new certificate was only issued when the old shares were returned?

A. Yes.

Q. Let us have the old shares themselves. (Shares produced.) (44)

Q. In the stock certificate book, at the proper place—they have been taken out for the purposes of evidence—appear these original certificates. Now let us know whether they are the numbers that correspond to these certificates which you produced; whether the original certificates correspond in numbers and amounts to those you have read from the stock book?

A. They do. These are the original certificates taken from the stock book. The stubs are there.

Q. They are all dated January 15, 1891, and all of them contain endorsements on the back, blank transfers, signed by W. W. Hand and witnessed by Harry J. Moore, do they not?

A. They do.

Q. Do the books show that the exchange was of 172½ shares for 230 shares? The par value of the stock remained the same per share, did it not?

A. Yes.

Q. What else was done?

A. The capital stock had been reduced from $250,000 to $150,000.

Q. And that was the proportionate issuance out of 230 shares?

A. Yes, sir.

Q. Tell us where those certificates came from, the 230 shares? (45)

A. These shares I have just offered? These were received by me with the other records of the bank.

Q. And what did they issue from? In whose name did those shares stand? Turn to the books for that.

A. You refer to the original issue of those shares?

Q. Yes, the Delamater shares. Let us have in whose name those shares stood originally.

A. 100 shares of that stock originally stood in the name of George B. Delamater.

Q. Give the number of the certificate in his name, and the date?

A. Certificate No. 21, dated March 1, 1865.

Q. You have the original certificate?

A. I have the original certificate here, and attached to the certificate is a transfer or bill of sale.

Q. A blank power of transfer?

A. Yes.

Q. Signed by whom?

A. Assigning this stock to W. W. Hand, by George B. Delamater.

Q. The date of that is January 29, 1889?

A. The date of the transfer, yes.

(46) Q. Now give us the residue.

A. Also one certificate, No. 57, for 30 shares, issued originally in the name of George B. Delamater, and assigned on the back side on the 31st day of January, 1899, to W. W. Hand by G. B. Delamater.

Q. You do not know anything about the handwriting or filling in of the body of any of these?

A. I do not.

Q. Now give the balance of it.

A. The other is represented by two certificates of 50 shares each, issued to G. W. Delamater, the original certificates being dated February 4, 1889.

Q. There is some guarantee of the signature on all of those?

A. Attached to these two certificates is an assignment to W. W. Hand by G. W. Delamater, dated the 6th day of February, 1889. On each of these assignments the Fidelity Insurance, Trust and Safe Deposit Company guaranteed the signatures.

By Mr. Dale:

Q. Some of them are guaranteed by other people, are they not?

A. Francis Rawle's name appears on one.

Q. As guarantor of the signature?

A. I am not sure whether he is the guarantor, or connected with
(47) the Fidelity. His name is beneath the name of the Fidelity Trust Company.

Q. Does not that appear below where the signature is guaranteed?

A. Yes, sir.

By Mr. Johnson:

Q. Are those the books from which the certificates of the stockholders are made up—from which the list is made in case of insolvency, under the banking law?

A. These books and the ledger; yes, sir.

Q. Is the ledger here?

A. Yes, sir; I have the two ledgers here.

Q. Turn to these matters and trace that stock, commencing with the Delamaters', and give us the entries on the books with regard to that.

A. On page 4 of the ledger, which I will designate as ledger No. 1—it is the first ledger, but I do not know that it is numbered 1, it is the first ledger of the bank—I find on pages 4 and 5 the account of

George B. Delamater, and I find charged to his account on January 15, 1891, 130 shares, transferred to W. W. Hand. On pages 88 and 89 I find the account of George W. Delamater, and on January 15, 1891, 100 shares of the stock transferred to W. W. Hand.

By Mr. Waters:

Q. These are the only books of the bank relating to the transfer of shares of stock?

(48)

A. Yes, sir.

Q. It was from these books the list of shareholders was made up under Section 5210?

A. Yes, sir; I should say so.

By Mr. Johnson:

Q. Have you the title traced from that on down, as it appears in the stock ledger?

A. In the account of W. W. Hand, pages 96 and 97, which I referred to before—That is the account already referred to.

WILLIAM W. HAND, Sworn.

By Mr. Johnson:

Q. What is your business?

A. I am clerk in the Fidelity Insurance, Trust and Safe Deposit Company.

Q. How long have you been a clerk with the company?

A. Since December, 1879.

Q. I show you three certificates of stock in the Keystone National Bank of Erie, those heretofore described, aggregating 230 shares, standing in your name; and I ask you whether you at any time owned these shares or had any ownership in them?

A. No, sir; I never owned these shares of stock.

Q. You never had any interest in them?

A. No interest in them.

Q. I see on the back of these certificates your signature to blank (49) powers to transfer.

A. Yes, sir.

Q. Witnessed by Harry J. Moore?

A. Yes.

Q. Who was Harry J. Moore?

A. He is a clerk in the same department I am.

Q. At whose request did you give that blank power of transfer?

A. I do not know that I had any particular request. When we re-

ceived them I put it on, for it was not mine; it was only to represent collateral.

Q. I merely asked you at whose request you put it on?

A. That I cannot tell.

Q. Then you did not at any time yourself have any ownership whatever of the 230 or 172½ shares of stock in the Keystone National Bank of Erie?

A. No, sir.

Q. Did you at any time retain custody either of the original 230 shares or of the new shares, 172½?

A. No, sir.

Q. From what institution or person did you get the shares which you endorsed your name upon, that you have in front of you?

A. Are these the original ones?

Q. Yes.

(50) A. These we received from the Keystone National Bank of Erie.

Q. And what did you do with them when you received them from the bank?

A. I put my name on the back and had it witnessed.

Q. Then what did you do with them?

A. I put them in the collateral with a loan of Delamater & Company.

Q. I now show you certificates dated February 1, 1893, in your name, for 172½ shares, and show you blank transfer endorsed the 10th of February, 1893, signed by yourself, and I ask you from what institution you received those shares?

A. I received those from the Keystone National Bank of Erie.

Q. And how soon after the receipt of them did you put your name on them?

A. I put my name on immediately, had Harry J. Moore to witness them, and placed them with the collateral of Delamater & Company.

Cross-Examined.

By Mr. Dale:

Q. When you say you placed them with the collateral of Delamater & Company, to what loan do you refer?

A. I refer to a loan of Delamater & Company from the Fidelity Company. Do you wish the date of the loan?

(51) Q. When was that loan made? I will ask you to refresh your recollection by certain memoranda made at that time.

Mr. Johnson: Did he make it? He has volunteered the statement

about the collateral, and perhaps that laid me open to something, but certainly not to testimony by the witness to something he knows nothing about. If he had nothing to do with the transaction I must object.

Mr. Dale: He had all to do with it as clerk by making the entries at the time.

Mr. Johnson: You must show that he did make them first.

Q. In what deparment of the Fidelity Company are you?

A. The loan department.

Q. How long have you been there?

A. Since December, 1879; 21 years.

Q. Have you or have you not personal knowledge of a loan made by the Fidelity Company to the Delamaters?

A. Yes, sir.

Q. Please state whether at the time the loan was made you made entries on the books of the Fidelity Company with reference to the same?

A. If I had that book I could tell whose writing it was; but I have made loans to them—that is, made the entries.

Q. I will ask you to look at the book and state.

Mr. Johnson: I object. (52)

The Court: He may say whether he made the entries.

Q. (Book shown witness.) In whose handwriting are certain entries which I point to in this book?

A. Harry J. Moore entered the loan, and part of it, the assessment paid, is in my handwriting.

Q. What knowledge had you of the making of the loan at the time it was made?

A. I had no particular knowledge, except that it was made by the officers of the company, and I merely carry the loan through the books; I enter them.

Q. And at the time it was made you knew it was made?

A. Yes, sir.

By Mr. Johnson:

Q. How did you know it was made? Did you see the Delamaters, or did you have any conversation with any of the Delamaters about it?

A. We have had plenty of correspondence with the Delamaters.

Q. Did you have any talk with any of the Delamaters about it?

A. No, sir. I had nothing to do with that.

Q. All you know is some of the officers handed you the papers and you made the entries on the books of the company?

A. Yes.

(53) Q. You have no personal knowledge of any sort or kind derived from the Delamaters concerning the matter, have you?

A. Not personally.

By Mr. Dale:

Q. At the time the loan was made to whose personal custody were the notes and collateral given?

A. I have the custody of the notes and collateral, also Mr. Harry J. Moore.

Q. You and Harry J. Moore have the personal custody of the notes and the collateral?

A. Yes, sir.

Q. Please state how soon after the loan was made these notes and collateral came into your possession?

Mr. Johnson: How can he know that? First, let us see how he knew it. If he did not know when the loan was made, how can he know that; and I object to that question.

Q. When was the loan to Delamater & Company made?

By Mr. Johnson:

Q. Do you know?

A. The original loan?

By Mr. Dale:

Q. The loan for which the shares were given to which you have referred.

(54) Mr. Johnson: I object to that because the witness testified he had no personal knowledge of the matter; that he never came in contact with the Delamaters; that he learned only from the officers of the institution, and therefore he is unable to testify to any fact as to the date.

A. Not personal knowledge, from personal contact with Mr. Delamater, but I have every knowledge of it.

The Court: I understand the witness to testify that in the usual course of business he received the notes and collaterals with reference to the loan in question, and made certain entries in the books with reference thereto; also that certain subsequent correspondence was had with reference to the loan. I think, therefore, he is competent to answer the question as to when the loan was made.

(Exception noted for plaintiff.)

Q. When was the loan made?

A. The loan was made on November 15, 1890.

Q. Was any obligation given by Delamater & Company for the loan?

A. Yes, sir.

Q. (Paper shown witness.) Please state whether or not that writing is the obligation given by Delamater & Company for that loan?

A. Yes, sir.

Mr. Johnson: I object to that, and to this examination, because it (55)
is not proper cross-examination. It is developing the case of the defence in the case of the plaintiff. I did not ask him anything about collateral. He volunteered it, and therefore for the defendant to be permitted to put its defence into my case is against the rules of evidence, and I object on that ground.

The Court: Objection sustained. I think the details of the loan should be presented in the defendant's own case.

By Mr. Johnson:

Q. Do you have any knowledge whatever of this transaction saving that which you derived from some of the officers of the Fidelity Company?

A. Yes, sir; I made the note out myself, in my own handwriting.

Q. And what did you do with that note when you made it out?

A. I handed it to an officer of the company. It is too far back for me to remember whether Mr. Delamater was present.

Q. You do not remember that he was present?

A. It is customary—

Q. I do not want what is customary. Do you know that he was present?

A. I know his signature is on that note, that I made it out at the (56)
office there, and he must have signed it.

Q. I ask you whether you know that Mr. Delamater was present at any time connected with this transaction, when you were by? I do not want you to guess at it.

A. I cannot recollect.

Q. I want to know if you have a personal recollection?

A. No, sir.

Q. Do you mean to say that that note of November 15, 1890, was not a renewal of a prior note?

A. It was a renewal of a prior note.

Q. Do you know in whose handwriting the body of the power of attorney to transfer the original shares, signed by G. B. Delamater, is? Do you know in whose handwriting the filling in of that is?

A. I cannot say whose handwriting that is. I do not know the handwriting that filled in the body of the 100 shares.

Q. Whose handwriting is the "W. W. Hand?"

A. That is Mr. Atherton's.

Q. He was vice-president of your company?

A. At that time, no, sir.

Q. He was treasurer?

A. Treasurer, probably.

Q. Then I show you another, and I ask you in whose handwriting is the "W. W. Hand" on that certificate for 30 shares?

(57) A. That is Mr. Atherton's writing, the treasurer of the company.

Q. I show you the transfer of the other 100 shares by G. W. Delamater, and ask you in whose handwriting the "W. W. Hand" is?

A. That is the same handwriting, Mr. Atherton's.

Q. And different in handwriting from the filling up of the body of that and the other two?

A. Yes, sir.

Q. And the "W. W. Hand" was not in there in either of these three certificates when the same were handed to you first, was it?

A. No, sir.

Q. It was filled up by Mr. Atherton afterwards?

A. Yes, sir.

Q. Did Mr. Delamater at any time, or the assignees of Delamater, request that that stock should be put into your name to your personal knowledge?

A. No, sir.

Q. You did not make that loan, did you?

A. No, sir.

Q. The Fidelity Company made it?

A. The Fidelity.

(58) Mr. Johnson: I now offer in evidence a proxy dated the 5th of January, 1893, signed by W. W. Hand, witnessed by Charles Atherton, appointing T. A. Lamb proxy to vote at the annual meeting of stockholders of the Keystone National Bank of Erie, Pa., to be held January 10, 1893, for the election of directors of the Keystone National Bank of Erie, and for any other necessary business.

Also proxy signed by W. W. Hand, and witnessed by Charles Atherton, dated the 28th of November, 1892, appointing T. A. Lamb proxy at a meeting of stockholders of the Keystone National Bank of Erie, Pa., to be held at the banking house on December 2, 1892, for the purpose of voting to confirm the cancellation of fifty thousand

dollars of stock of the bank, taken by the bank as collateral for loans made, the payment of which, both principal and interest, has been defaulted, leaving the capital stock of the bank $200,000, as per order of the Comptroller of the Currency; to vote upon the pro rata reduction of 25 per cent. of the capital stock of the bank now standing $200,000, as required by the Comptroller of the Currency.

I also offer in evidence the following letters written by Charles Atherton, treasurer, or Charles Atherton, vice-president, of the Fidelity Company:

The Fidelity Insurance, Trust and Safe Deposit Company, (59)

325-331 Chestnut Street.

Philadelphia, January 10, 1891.

Keystone National Bank of Erie, Erie, Penna.

Gentlemen: We enclose herewith certificates for two hundred and thirty shares capital stock of your bank which we wish transferred to W. W. Hand, viz.:

Certificate	No. 57,	Regd.	Geo. B. Delamater	30 shares
"	" 21,	"	do	100 shares
"	" 168,	"	Geo. W. Delamater	50 shares
"	" 167,	"	do.	50 shares
				230

You will please return to us certificates two one hundred shares each, one of thirty shs.

Yours truly,

CHAS. ATHERTON,

Treas'r.

All the letters are headed "The Fidelity Insurance, Trust and Safe Deposit Company, Philadelphia."

The next letter is:

Philadelphia, Jany. 19, 1891.

Keystone Natl. Bank, Erie, Penna.

Gentlemen: Your favor of the 17th inst. received enclosing certfs. (60) for 230 shares of the stock bank registered in the name of W. W. Hand. We would like to have a bid for the stock if you know of a purchaser.

Yours truly,

CHAS. ATHERTON,

Treas'r.

The next letter is:

Philadelphia, January 17, 1891.

Keystone Natl. Bank of Erie, Pa.

Gentlemen: We mailed you by registered letter on the 10th inst. 230 shares of stock of your bank, for transfer, of which we have no acknowledgment. Was it received?

Yours truly,

CHAS. ATHERTON,

Treas'r.

Philadelphia, Jany. 24th, 1893.

Keystone National Bank of Erie, Pa.

Gentlemen: Enclosed you will find certificates 180-181 each 100 shares, No. 183, 30 shares of your bank, to be exchanged in accordance with resolution of stockholders December 2d, 1892. You will
(61) please return the new certificates to this address.

Very truly yours,

CHAS. ATHERTON,

Treas'r.

Philadelphia, Feb. 10, 1893.

F. V. Kepler, Esq.,

Cashier Keystone Natl. Bank, Erie, Penna.

Dear Sir: Yours of the 7th received with certificate for 172½ shares new stock of your bank.

Very truly yours,

CHAS. ATHERTON,

Treas'r.

Philadelphia, November 13, 1893.

Keystone Natl. Bank, Erie, Pa.

Gentlemen: You will please send us your last statement, and any other information in regard to the affairs of your bank that might interest us.

Very truly yours,

CHAS. ATHERTON, Treasr.

Philadelphia, March 20, 1894.

Matthew Griswold, Prest.,

Keystone National Bank, Erie, Pa.

(62) Dear Sir: This company holds 172½ shares of your bank registered in the name of W. W. Hand. We would like you to send us copy of

your last statement and any other information in regard to the business of the bank, and as to whether there is any sales of stock, and what price. We would like to sell our holdings, if marketable.

Yours truly,

CHAS. ATHERTON,

Vice-Prest.

Philadelphia, March 17, 1897.

F. V. Kepler, Esq.,

Cashier The Keystone Natl. Bank, Erie, Pa.

Dear Sir: This company owns 172½ shares of the stock of your bank registered in the name of W. W. Hand. We would be much obliged for any information you can give us in regard to the business of the bank, and a copy of your last statement to the Comptroller. Do you know of any sales of the stock, and at what price sold? We are anxious to sell the stock to close an account. If you can put us in the way of finding a customer, we will pay the usual commission.

Yours truly,

CHAS. ATHERTON,

Vice-Prest.

Philadelphia, October 14, 1897.

F. M. Lamb, Esq.,

Cashier Keystone N. Bk., Erie, Penna.

Dear Sir: I saw a report in one of the newspapers that your bank was going into voluntary liquidation. You will please inform us (63)
whether the report is true, and if so will there be any value in the stock. The stock in the name of W. W. Hand belongs to this company. Please give us such other information as you can.

Very truly,

CHAS. ATHERTON,

Vice-Prest.

We now offer in evidence the deposition of Joseph I. Towne, who was a witness produced on behalf of the plaintiff, taken at Erie, Pennsylvania, as follows:

JOSEPH I. TOWNE, a witness produced on behalf of the plaintiff, being first duly sworn, deposes and says as follows:

Questions by Mr. Waters:

Q. You have stated your name as Joseph I. Town?

A. Yes, sir.

COPY BOUND CLOSE IN CENTER

Q. Kindly state where you reside?

A. Erie, Pa.

Q. About how long have you resided in Erie?

A. Since 1864.

Q. Were you at any time an officer of the Keystone National Bank of Erie?

A. Yes, sir.

Q. What office or offices did you fill and at what time?

(64) A. When I first came here I was bookkeeper. I came here in December, 1864. I was afterwards assistant cashier, and after that cashier.

Q. I hand you a book which I will ask you if you will kindly identify?

A. Yes, sir. This is the stock certificate book of the Keystone National Bank of Erie.

Q. I call your attention to Certificate No. 21, issued March 1, 1865, to George B. Delamater for one hundred shares of stock of that bank, signed by John J. Town, cashier?

A. That was the first cashier of the bank, and is not my signature.

Q. You were not cashier at that time?

A. No.

Q. Were you cashier in the years 1890 and 1891?

A. Yes, sir.

Q. Kindly examine the certificate No. 21, just referred to, and marked for identification "Exhibit 4,-May 23, 1900, L. E. H.," and state whether you recognize the handwriting across the face of it in these words: "Cancelled by issue of Certificate No. 181, January 15, 1891?"

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. That is my handwriting.

(65) Q. I show you a letter purporting to be from Charles Atherton, treasurer, dated January 10, 1891, addressed to the Keystone National Bank of Erie, Pa., and ask you whether as cashier of the bank at that time you have seen this letter. The letter is in words as follows:

(The heading is Fidelity Insurance, Trust and Safe Deposit Company, 325-331 Chestnut street, naming the officers of the company.)

Philadelphia, Jan. 10, 1891.

Keystone National Bank of Erie, Erie, Pa.

Gentlemen: We enclose herewith certificates for 230 shares capital stock of your bank which we wish transferred to W. W. Hand, viz.:

Certificate No. 57, Reg'd Geo. B. Delamater, 30 shares
Certificate No. 21, reg'd Geo. B. Delamater 100 shares
Certificate No. 168, reg'd G. W. Delamater 50 shares
Certificate No. 169, reg'd G. W. Delamater 50 shares

230

You will please return us certificates two 100 shares each, one of 30 shares.

Yours truly,

CHAS. ATHERTON,

Treas'r.

A. I have no doubt this is correct in connection with the issue of the certificates. I mean that I have no doubt that I received that letter at the time.

Plaintiff offers this letter in evidence, and it is marked for identification "Ex. 1, May 25, 1900, R. B. S." (66)

Q. I now call your attention to the assignment attached to this certificate, signed G. B. Delamater, marked for identification "Exhibit 5, May 23, 1900, L. E. H." Will you kindly state what you know in regard to that certificate No. 21, and the assignment attached thereto, whether or not it came into your possession as cashier of the bank, for what purpose, and what was done in connection with it?

A. This assignment was received with the certificate of stock.

Q. Do you identify the letter in connection with it?

A. Yes, sir; this is the letter.

Q. What was done under the instructions of the letter?

A. Under instructions of the letter just shown me the stock was transferred and assigned to W. W. Hand.

Q. State whether or not that certificate, No. 21, was surrendered to the bank?

A. Yes.

Q. And cancelled?

A. Yes.

Q. And marked cancelled as you have stated across the face of it by you as cashier?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. When cancelled, what was done with it, so far as this stock certificate book was concerned? (67)

A. It was pasted opposite the corresponding stub in the certificate book from which it had been issued.

Q. Was that the usual practice of the bank when certificates of stock were surrendered and cancelled?

A. Yes, sir.

Q. Who had charge of the issuing of certificates of stock and of the certificate of stock book particularly?

A. The cashier.

Q. While you were cashier you had charge of this book and of the surrendering and cancellation and issuing of certificates of stock?

A. Yes, sir.

Q. I call your attention to the stub in this book in words as follows:

"Keystone National Bank.

Certificate No. 181.

For 100 shares.

Issued to W. W. Hand.

Dated January 15, 1891.

Received this certificate.

Sent to Fidelity Insurance, Trust and Safe Deposit Company, 1-17-91."

(68) which stub is marked for identification "Ex. 2, May 25, 1900, R. B. S." Will you kindly state who filled in the blanks in this stub?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. I filled in the "181, 100, W. W. Hand, January 15, 1891."

Q. Who wrote on that stub "Sent to Fidelity Insurance, Trust and Safe Deposit Company, 1-17-91?" Who wrote the words, if you know?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. F. V. Kepler, assistant cashier.

Q. State whether or not this stock certificate book was kept in the bank in your charge, while you were cashier, open to the inspection of the shareholders and creditors of the bank, as may have been required?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. It was.

Q. So that any creditors of the bank at any time after this entry upon the stub of this certificate stock book made on or about January 17, 1891, could have seen it, as it was open to the inspection of

the creditors of the bank from that time until the bank closed its doors on or about June 29, 1897?

Defendant objects to the question as incompetent, irrelevant and (69) immaterial.

A. Yes.

Q. I show you certificate No. 57, attached to the corresponding stub in this stock certificate book having on the back of it an assignment signed G. B. Delamater, the certificate calling for 30 shares of stock of the Keystone National Bank of Erie, issued to George B. Delamater under date of April 6, 1871, being the same certificate marked for identification "Exhibit 6, May 23, 1900, L. E. H.," and ask you whether this is one of the certificates included in the letter from Charles Atherton, treasurer, of January 10, 1891, which has been shown you?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, that was the same.

Q. This certificate has marked across the face of it "Cancelled by issue of Certificate No. 183, January 15, 1891." Kindly state in whose handwriting these words are written?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. In my handwriting.

Q. You cancelled this certificate, did you, as cashier of the bank?

Defendant objects to the question as incompetent, irrelevant and (70) immaterial.

A. Yes, sir.

Q. It having been first surrendered to the bank for cancellation?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. Did you cancel the two certificates which we have already referred to, Nos. 21 and 57, on or about January 15, 1891?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes.

Q. I now show you two certificates attached to corresponding stubs in this stock certificate book, numbered respectively 168 and 169, for 50 shares each of capital stock of the Keystone National Bank of Erie, Pa., in the name of G. W. Delamater, and bearing date February 4, 1889, marked for identification "Exhibit 1, May 23, 1900, L. E. H.," and 'Exhibit 2 May 23, 1900, L. E. H.' also the assignment

attached to them signed G. W. Delamater, marked for identification "Exhibit 3, May 23, 1900, L. E. H.," and ask you whether these two certificates were certificates sent you by Charles Atherton, treasurer of the defendant company, on or about January 10, 1891, while you were cashier of the aforesaid bank?

(71) A. I think they are.

Q. Across the face of each of these certificates, numbered 168 and 169, is written the words "Cancelled by the issue of certificate No. 180, January 15, 1891." Are those words in your handwriting?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. They are.

Q. While you were cashier of the bank?

A. Yes, sir.

Q. And were they so written about January 15, 1891?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. The four certificates numbered 57, 21, 168 and 169, calling in the aggregate for 230 shares of stock, were sent to you by the Fidelity Insurance, Trust and Safe Deposit Company as per their letter of January 10, 1891, for the purpose of cancellation, surrender and transfer on the books of the bank to one W. W. Hand, were they not?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

(72) Q. I call your attention to a stub in this certificate of stock book as follows:

"Keystone National Bank.

Certificate No. 183.

For 30 shares.

Issued to W. W. Hand.

Dated January 15, 1891.

Received this certificate.

Sent to Fidelity Insurance, Trust and Safe Deposit Company, Phil'a, Pa., 1-17-91."

which stub is marked for identification "Ex. 3, May 25, 1900, R. B. S." Kindly state in whose handwriting the blanks are filled in? Who wrote the "183, 30, W. W. Hand, January 15, 1891?"

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. I did.

Q. Was this written by you on or about January 15, 1891?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. It was.

Q. In whose handwriting are the words on this stub, "Sent to Fidelity Insurance, Trust and Safe Deposit Company, Phil'a, Pa., 1-17-91?"

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. In the handwriting of F. V. Kepler, assistant cashier. (73)

Q. Was that written, to the best of your knowledge, at the date named there, January 17, 1891?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. I suppose so.

Q. These entries in this certificate of stock book have been open for the inspection of the creditors of the bank since they were made?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. I now call your attention to a stub in this certificate of stock book in words as follows:

"Keystone National Bank.

Certificate No. 180.

For 100 shares.

Dated January 15, 1891.

Received this certificate.

Sent to Fidelity Insurance, Trust and Safe Deposit Company, Phil'a, Pa., 1-17-91,"

which is marked for identification "Ex. 4, May 25, 1900, R. B. S." Will you kindly state in whose handwriting the blanks are filled in on this stub?

A. I wrote the figures "180" and "100" and the name "W. W. (74) Hand," and the date "January 15, 1891."

Q. This was written by you on or about January 15, 1891?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. While you were cashier of the bank?

A. Yes, sir.

Q. State, if you know, who wrote on this last stub mentioned the words "Sent to Fidelity Insurance, Trust and Safe Deposit Company, Phil'a, Pa., 1-17-91?"

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. F. V. Kepler, assistant cashier.

Q. State whether or not this was written by him at the date named, January 17, 1891?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. I suppose so.

Q. This stub, as the others, with the writing on it as you have stated, in this stock certificate book, remained in the office of the bank under the control of yourself as cashier from the date of these entries, January 15 and 17, 1891, open to the inspection of the creditors of the bank, did they not?

(75) Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. Is F. V. Kepler, who was assistant cashier in 1891, now living?

A. He is not. He died about two years ago, to the best of my recollection.

Q. I now show you three certificates of stock of the Keystone National Bank of Erie, Pa., numbered 180, 181 and 183 for respectively 100, 100 and 30 shares, aggregating, 230 shares, issued in the name of W. W. Hand under date of January 15, 1891, and signed J. I. Town, cashier; J. F. Downing, president; marked for identification "Ex. 5, May 25, 1900, R. B. S.," "Ex. 6, May 25, 1900, R. B. S." and "Ex. 7, May 25, 1900, R. B. S." Kindly state whether you are the J. I. Town who signed the certificates and whether or not they are certificates issued as shown by the corresponding stubs in the stock certificate book, about which you have just testified?

A. Yes, that is my signature on these as cashier. These are the certificates that were issued as shown by the corresponding stubs, as to which I have testified.

Counsel for plaintiff here asks counsel for defendant to produce a letter written January 17, 1891, in words as follows:

(76) Mr. Dale: At the taking of the depositions we were asked to produce the original letter addressed to Charles Atherton, treasurer, by J. I. Town, cashier of the bank. We have no such original letter, and they have a copy in their letter book. If it is understood all the correspondence between these two institutions, as shown by the regular letter books, will go in I am perfectly willing to admit them.

Mr. Johnson: I do not agree to that.

Mr. Dale: Then I object to the reading of the letters.

Mr. Johnson: Then we will leave that out. It is utterly immaterial.

Counsel for plaintiff here also offers in evidence the certificates of stock and assignments attached thereto, the stubs in the certificate of stock book being marked for identification as Exs. 1 to 7 inclusive, May 25, 1900, R. B. S.

Defendant objects to the question as incompetent, irrelevant and immaterial.

Q. Are these three certificates numbered 180, 181 and 183, which I have just shown you and which are marked Exs. 5 to 7, inclusive of this date, calling in the aggregate for 230 shares of stock of the Keystone National Bank of Erie, the certificates that were enclosed by you to Charles Atherton, treasurer, of the defendant at Phil'a., Pa., in your letter of January 17, 1891, which you have just identified? (77)

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. These are the certificates referred to in the letter.

Q. I hand you two letters, dated January 17, 1891, and January 19, 1891, both signed Charles Atherton, treasurer, and ask if these were the letters received by you while cashier of the Keystone National Bank of Erie on or about the dates named?

A. I have no doubt but they are.

The letter of January 17, 1891, marked for identification "Ex. 9, May 25, 1900, R. B. S.," signed "Charles Atherton, treasurer," and the letter of January 19, 1891, marked for identification "Ex. 10, May 25, 1900, R. B. S.," signed by Charles Atherton, treasurer, are here offered in evidence by counsel for plaintiff.

The letter of January 17, 1891, Ex. 9 of this date, is in words as follows:

The Fidelity Insurance, Trust and Safe Deposit Co., 325-331 Chestnut St. (the officers of the company being named).

Phila'a, Jan. 17, 1891.

Keystone National Bank, Erie, Pa. (78)

Gentlemen: We mailed per registered letter on the 10th inst. 230 shares of stock of your bank for transfer. We have no acknowledgment. Was it received?

Yours truly,

CHARLES ATHERTON,

Treasurer.

The letter of January 19, 1891, Ex. 10, is in words as follows:

The Fidelity Insurance, Trust and Safe Deposit Co. (the officers and address being named).

Phila'a, Jan. 19, 1891.

Keystone National Bank, Erie, Pa.

Gentlemen: Your favor of the 17th inst. received enclosing certificates for 230 shares of stock of the bank registered in the name of W. W. Hand. We would like to have a bid for the stock if you know of a purchaser.

Yours truly,
CHARLES ATHERTON,
Treasurer.

(79) Q. I now ask you if the last letter just quoted was a receipt from the Fidelity Insurance, Trust and Safe Deposit Company of 230 shares of stock sent to them as you have stated, and that you have stated in your letter of January 17, 1891, and the certificates enclosed were those numbered 180, 181 and 183, being Exs. 5 to 7 of this date?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. That is an acknowledgment of the receipt of that stock.

Q. I now show you a letter dated January 24, 1893, and signed by Charles Atherton, treasurer, in words as follows:

The Fidelity Insurance, Trust and Safe Deposit Co. (giving names of officers and street address).

Phila'a, Jan. 24, 1893.

Keystone National Bank of Erie, Pa.

Gentlemen: Enclosed you will find certificates 180 and 181, each for 100 shares; No. 183, 30 shares, of your bank, to be exchanged in accordance with resolutions of stockholders, December 2, 1892. You will please return the new certificates to this address.

Very truly yours,
CHARLES ATHERTON,
Treasurer.

which letter is marked for identification "Ex. 11, May 25, 1900. R.
(80) B. S." Attached to this letter are the three certificates numbered 180, 181 and 183, marked for identification Exs. 5 to 7 inclusive, which you state were sent to the Fidelity Insurance, Trust and Safe Deposit Company on or about January 17, 1891. Will you kindly state what you know of this letter, if anything?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. This letter is undoubtedly genuine, and to the best of my knowledge was received at the bank at about the time of its date, enclosing the certificates attached.

Q. I now show you another book and ask you whether you can identify it as a book of the bank?

A. Yes, sir.

Q. State what it is?

A. This is the new stock certificate book.

Q. What was the occasion of having another stock certificate book?

A. The capital stock of the bank was reduced, and I think the new stock was issued in this new book.

Counsel for plaintiff offers in evidence both the old stock certificate book and the new stock certificate book of the Keystone National Bank of Erie Pa.

(Defendant objects to the offer as incompetent, irrelevant and immaterial.)

Q. I call your attention to stub No. 236 in this new stock book, (81) which is in words as follows:

"Certificate No. 236.
For 172¼ shares.
Issued to W. W. Hand.
Dated Feb. 1, 1893.
Transferred from..... 189
No. Original Certificate,
No. Original Shares,
No. of Shares Transferred,
Received this certificate.
Sent by reg. mail 2-7-93,"

which stub is marked for identification "Ex. 12, May 25, 1900, R. B. S.," and ask you in whose handwriting the blanks are filled in, if you know?

A. My impression is it is in Mr. F. V. Kepler's. He was cashier at that time.

Q. Down at the bottom of this stub are written the words "Sent by reg. mail 2-7-93." Do you know whose handwriting that is?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. It is my impression it is Mr. Kepler's. (82)

Q. For how many years, about, were you associated in the bank with F. V. Kepler?

A. I would say in the neighborhood of 18 or 20 years. I know I took him in the bank before he was of age.

Q. During that time he was working under your direction or by your side continually, was he not?

A. Yes.

Q. You saw his handwriting, then, almost daily?

A. Yes, sir.

Q. Are you familiar with it?

A. Yes, sir.

Q. You are therefore able to identify his handwriting?

A. I think so.

Counsel for plaintiff states that they will call upon the defendant to produce the certificate of stock for 172½ shares, dated Feb. 1, 1893, represented by this stub No. 236.

Counsel for defendant states that he has not the certificate with him.

Adjourned to 2 o'clock P. M. of same day.

Afternoon Session.

May 25, 1900, at 2 P. M., pursuant to adjournment, the taking of
(83) deposition was resumed, same parties and counsel being present as at morning session.

The examination of Joseph I. Town was resumed by Mr. Waters, as follows:

Q. Have you seen Mr. F. V. Kepler in the act of writing?

A. Yes, sir, a great many times.

Q. You have seen him write his name and seen him writing generally?

A. Yes, sir.

Counsel for plaintiff here calls upon the defendant to produce the original letter, dated Erie, Feb. 7, 1893, addressed to Charles Atherton, treasurer of the Fidelity Insurance, Trust and Safe Deposit Co., Phila., Pa., in words as follows:

Mr. Dale: I object to that. We will produce whatever originals we have.

Mr. Johnson: Let us have it if you have it now.

Original letter not produced.

Q. When did you resign as cashier?

A. January 14, 1893.

Q. Could you state when Mr. Kepler was elected cashier?

A. He was elected cashier at the same meeting, Jan. 14, 1893.

Q. After your resignation as cashier did you hold any office in the bank?

A. Not as an officer. I was director. (84)

Q. Not as an executive officer, but as a director?

A. Yes, sir.

Q. And did you continue a director until the doors of the bank closed?

A. Yes, sir.

A. As a director of the bank, after your resignation as cashier, were you familiar with the books of the bank and its correspondence?

A. Not so very much—generally as director, but not so fully as if I were an executive officer.

Q. While you were cashier you were also director?

A. Yes, sir.

Q. I show you the following letter upon the letter-head of the Fidelity Insurance, Trust and Safe Deposit Company, dated Phil'a, Feb. 10, 1893, addressed to F. V. Kepler, Esq., cashier Keystone National Bank, Erie, Pa., reading as follows:

Dear Sir: Yours of the 7th received with certificate for 172½ shares new stock of your bank.

Very truly yours,

CHARLES ATHERTON,

Treasurer.

Can you identify that letter as a letter received about the time of its date by the bank in acknowledgment of the receipt of 172½ shares of (85) new stock enclosed in the letter of February 7, 1893, to which I have just called your attention?

A. I should judge it was correct, but I was not in the institution at that time as an executive officer. It would indicate that it was an acknowledgment of the receipt of the stock.

Letter just referred to is offered in evidence by counsel for plaintiff, and is marked for identification "Ex. 14, May 25, 1900, R. B. S."

Q. I hand you the four following letters, all of them written upon the letter-head paper of the Fidelity Insurance, Trust and Safe Deposit Company, and in words as follows:

Phil'a, Nov. 13, 1893.

Keystone National Bank, Erie, Penna.

Gentlemen: You will please send us your last statement and any other information in regard to the affairs of your bank that may interest us.

Very truly yours,
CHARLES ATHERTON,
Treasurer.

Phil'a, March 20, 1894.

Matthew Griswold, President Keystone National Bank, Erie, Pa.

(86) Dear Sir: This company holds 172½ shares of your bank registered in the name of W. W. Hand. We would like you to send us copy of your last statement and any other information in regard to the business of the bank, and as to whether there is any sale of stock and what price. We would like to sell our holdings, if marketable.

Yours truly,
CHARLES ATHERTON,
Vice-President.

Phila., March 17, 1897.

F. V. Kepler, Esq., Cashier Keystone National Bank, Erie, Pa.

Dear Sir: This company owns 172½ shares of stock of your bank registered in the name of W. W. Hand. We would be much obliged for any information you can give us in regard to the business of the bank and a copy of your last statement to the Comptroller. Do you know of any sales of stock, and at what price sold. We are anxious to sell the stock to close an account. If you can put us in the way of finding a customer, we will pay the usual commission.

Yours truly,
CHARLES ATHERTON,
Vice-President.

(87) Phil'a, Oct. 14, 1897.

F. M. Lamb, Esq., Cashier Keystone National Bank, Erie, Pa.

Dear Sir: I saw a report in one of the newspapers that your bank was going into voluntary liquidation. You will please inform us whether the report is true, and, if so, will there be any value in the stock. The stock in the name of W. W. Hand belongs to this company. Please give us such other information as you can.

Yours truly,
CHARLES ATHERTON,
Vice-President.

Q. I hand you these four letters and ask whether you can identify them as letters received from the defendant?

A. No; I don't remember having seen these letters.

Q. They were received after you had resigned as cashier?

A. Yes, sir.

Counsel for plaintiff hands these four letters to counsel for defendant and asks him to examine them and state whether or not he admits that they are the letters written by an officer of the defendant company to the Keystone National Bank at the dates stated herein.

Mr. Dale: He wrote them in his official capacity as vice-president (88) or treasurer.

Q. State whether or not there were other books than the stock certificate books kept by the bank to record the transfers and ownership of the capital stock of the bank?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. The stock ledger book.

Q. Was there any other book than the stock ledger book for the purpose of recording transfers of stock on the books of the bank kept by the Keystone National Bank of Erie, Pa.?

A. Not that I remember of.

Q. I understand you, then, to state that the only books kept by the bank for the purpose of registering its capital stock were the stock certificate books, two of which have been shown you, and the stock ledger book?

A. As far as my recollection, yes, sir.

Q. I hand you a book which you will kindly identify, if you can?

A. It is the stock ledger book of the Keystone National Bank of Erie, Pa.

Counsel for plaintiff offers the stock ledger book just shown witness in evidence and it is marked for identification on the inside of the (89) first cover "Ex. 19, May 25, 1900, R. B. S."

Counsel for defendant objects to the offer as incompetent, irrelevant and immaterial.

Q. I call your attention to pages 4 and 5 of this stock ledger book and ask you whose account is kept on those pages?

A. George B. Delamater's.

Q. I ask you what the entry is on the debit side of the account, the next to the last line before balancing?

A. Entry January 15, 1891, 130 shares transferred to W. W. Hand by George B. Delamater.

Q. What is the amount?

A. $13,000.

Q. Was this stock ledger in your charge as cashier?

A. Yes, sir.

Q. It was kept by you?

A. Yes, sir.

Q. Is this entry in your handwriting?

A. It is.

Q. You were cashier January 15, 1891?

A. Yes, sir.

Q. When the entry was made?

A. Yes, sir.

(90) Q. I call your attention to pages 88 and 89 of this stock ledger and ask you what is the first account recorded on those pages?

A. George W. Delamater's.

Q. Kindly state what the debit entry is in that account?

A. It is an entry January 15, 1891—100 shares of stock to W. W. Hand $10,000.

Q. Does that show a transfer on the books from Geeorge W. Delamater to W. W. Hand of that stock?

A. It does.

Q. Is that entry in your handwriting?

A. It is.

Q. Made by you while cashier of the bank?

A. Yes, sir.

Q. I now call your attention to the account on pages 96 and 97 of this stock ledger. Will you kindly state in whose name the account was entered?

A. That account is entered in the name of W. W. Hand.

Q. Will you state the credit entry to that account?

A. January 15, 1891—230 shares of stock, $23,000.

Q. Will you now kindly read the debit entries in that account?

A. February 1, 1893—25 per cent. assessment, $5750; new stock $17,250.

(91) Q. What is the total of these two items?

A. $23,000.

Q. Is the account balanced?

A. It is.

Q. Will you kindly state what is written over the name W. W. Hand in this account?

Mr. Dale: That asks the witness to state the lead-pencil entry on the

book which is already the subject of ruling by your Honor this morning. It would be objectionable for the witness to state the contents of the writing.

Mr. Johnson: We will make the offer.

The Court: There is other evidence of the declaration of the officers themselves that is much better evidence on that point. I do not think it worth while to raise that point.

Q. In whose handwriting is the debit entry?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. In Mr. Kepler's.

Q. In whose handwriting are the words "Fidelity Trust and Safe Deposit Co., Phil'a, Pa."?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. My impression is that it is Mr. Kepler's, although I wouldn't (92)
be so positive as that of some others, but I think there is no doubt that it is his handwriting.

Q. I think you have already testified that Mr. Kepler was elected cashier on January 14, 1893?

A. Yes, sir; I believe so.

Q. You are quite sure that the debit entries are in the handwriting of Mr. Kepler?

A. Yes, sir.

Q. Are you equally as sure from looking at the handwriting that the entry written over the name W. W. Hand "Fidelity Trust and Safe Deposit Co., Phil'a, Pa." is in the same handwriting?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. It is my impression it is, but I would not be so positive.

Q. I hand you a paper which you will kindly identify, if you can?

A. Yes, I suppose that was filled out by me.

Q. What is that paper?

(Defendant objects, because the paper speaks for itself.)

A. It is a proxy to vote for the reduction of the capital stock of the (93)
bank.

Counsel for plaintiff offers this paper in evidence, and it is marked for identification "Ex. 20, May 25, 1900, R. B. S."

(Defendant objects to the offer as incompetent, irrelevant and immaterial.)

Q. The stock ledger book was at all times during business hours of the day open to the inspection of creditors?

A. Of course, if anybody wanted to see it, it would be handed to them.

Q. And it was so open to inspection from January 15, 1891, down to about June 29, 1897?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. As far as I know.

Q. I hand you a paper and ask you if you can identify it?

A. Yes, sir; that was filled out by me.

Q. What is it?

(Defendant objects; the paper speaks for itself.)

A. It is a proxy to vote at the meeting of stockholders.

Counsel for plaintiff offers this paper in evidence, and it is marked for identification "Ex. 21, May 25, 1900, R. B. S."

(94) Q. I hand you a book and ask you whether or not you can identify it as a book of the bank?

A. Yes, sir; it is the minute book.

Q. Was it kept by you?

A. Yes, sir.

Q. While you were cashier?

A. Yes, sir.

Q. Can you state as to the payment of dividends by the bank, when the last dividend was paid or declared?

A. I don't remember.

Q. You were cashier of the bank for about eighteen years?

A. For over 20 years.

Q. Prior to January 14, 1893, when you resigned?

A. Yes, sir.

Q. During that time did the bank declare regular semi-annual dividends?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. Not all the time.

Counsel for plaintiff offers in evidence the minutes of the meetings of the stockholders and directors of the Keystone National Bank of
(95) Erie as contained in the minute book just identified by the witness, and it is marked on the inside of the front cover for identification "Ex. 22, May 25, 1900, R. B. S."

(Defendant objects to the offer as incompetent, irrelevant and immaterial.)

Q. To the best of your recollection were not semi-annual dividends paid by the bank during the time that you were cashier, excepting the years 1892 and 1893, and the last half of 1891?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. I think there were some few dividends passed before that. During my incumbency of the office of cashier of the bank there were only a few semi-annual dividends passed by the bank prior to July, 1891. The last semi-annual dividend was two per cent., January 13, 1891.

Q. Will you look on page 179 of these minutes and state what the net earnings were of the bank for the six months ending December 31, 1890?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. $12,368.85.

Q. Will you kindly look on page 184 of the minutes and state what the net earnings of the bank were for the six months ending June 30, 1891?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. $7,123.47.

Q. Look at page 186 and state what the net earnings of the bank were for the six months ending December 31, 1891?

(Defendant objects to the question as incompetent, irrelevant and (96)
immaterial.)

A. $4,020.51.

Q. Kindly look on page 194 and state what the net earnings of the bank were for the six months ending June 30, 1892?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. $4,356.05.

Q. Will you kindly look on page 200 of the minutes and state what the net earnings were for the six months ending December 31, 1892, as shown by the books of the bank?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. $4,845.43.

Q. Kindly look on page 208 and state what the net earnings of the bank were as shown by its books for the six months ending June 30, 1893?

A. $1,171.62.

Q. Look on page 213 of the minutes and state what the net earnings
(97) of the bank were as shown by the books for the six months ending December 31, 1893?

A. $1,755.27.

Question by Mr. Dickson:

Q. Are all the minutes from which you have read in your handwriting?

A. They are, prior to January 14, 1893, when I resigned as cashier; after that they are in the handwriting of Mr. F. V. Kepler, my successor as cashier, with whose handwriting I am familiar.

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

Mr. Waters, resuming:

Q. Please look on page 222 of the minutes and state what the net earnings of the bank were as shown by the books for the six months ending June 30, 1894?

A. $2,523.18.

Q. Kindly look at page 233 and state what the net earnings of the bank were as shown by the books for the six months ending June 30, 1895?

A. $3878.86.

Q. Kindly look at page 250 and state what the net earnings of the bank were as shown by its books for the six months ending June 30, 1896?

A. $3708.99.

(98) Q. Kindly look at page 201 of the minutes of stockholders, meeting of January 10, 1893, and state whether or not it is in your handwriting?

A. Yes, sir.

Q. At that meeting do the minutes show that W. W. Hand, representing the 230 shares of stock of the Keystone National Bank in question voted the same?

(Defendant objects to the question as incompetent, irrelevant and immaterial. The minutes speak for themselves.)

A. It shows that he voted the same by proxy to T. A. Lamb.

Q. Kindly look at page 198 of the minutes of the meeting of stockholders held December 2, 1892, and state whether those minutes are in your handwriting?

A. They are.

Q. State what questions were voted upon at that meeting?

(Defendant objects to the question as incompetent, irrelevant and immaterial. The minutes speak for themselves.)

A. The following questions were voted upon at that meeting of the stockholders: First. As to a reduction of $50,000 by the cancellation of that amount of stock of the bank held by it as collateral security for loans made, the payment of which both principal and (99)
interest has been defaulted. Second. The further pro rata reduction of the capital stock of the bank 25 per cent. of the reduced capital, leaving the capital stock of the bank $150,000.

Q. What was the result of the vote on those questions—as shown by these minutes in your handwriting?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. On the first proposition the owners of 1929 shares voted in favor of the proposition and no votes were cast against the same. On the second proposition for the reduction of the capital stock to $150,000, the owners of 1849 shares of stock voted in favor thereof, and the owners of 80 shares of stock voted against said proposition.

Q. Did W. W. Hand, representing the 230 shares of stock in question in this action vote on that proposition?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. Yes, by proxy.

Q. Did he vote in favor of both propositions?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. Yes, he voted in favor of both propositions.

Q. I call your attention to page 196 of the minutes and ask if the (100)
same are in your handwriting?

A. Yes, sir.

Q. State whether those are the minutes of a meeting of the directors of the bank on September 5, 1892, in which the following resolution was passed: "Resolved, that the assessment ordered by the Comptroller of the Currency be assessed, notice given and payment ordered within ten days from this date."

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. Yes, that is in my handwriting.

Q. I call your attention again to the debit entry on page 96 of this stock ledger of the bank, and ask whether there is an entry showing the payment of the assessment called for at the meeting of the directors of September 5, 1892?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. There is an entry here of the assessment being paid 25 per cent., amount, $5750.

Q. Was that payment made by the Fidelity Insurance, Trust and Safe Deposit Company of Phil'a, Pa.?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. I suppose so.

(101) *Cross-Examined by Mr. Dickson.*

Q. You have said in answer to the last question asked you that you supposed the Fidelity Company had made payment of the assessment?

A. Yes.

(Counsel for defendant here calls upon counsel for plaintiff to produce the letter addressed to witness by W. W. Hand and dated September 16, 1892. Counsel for plaintiff produces letter.)

Q. I show you letter dated "Phil'a, September 16, 1892," reading as follows:

Mr. J. I. Town,

Cashier Keystone National Bank, Erie, Pa.

Replying to your letter of the 7th, calling for assessment of 25 per cent. on 230 shares of stock in your bank, standing in my name, I herewith enclose check for the amount payable, $5750, and will thank you to return the proper receipt. You will further oblige by stating whether any progress has been made towards cancelling the $50,000 shares of your stock held by you, or if any further reduction of the capital stock.

Yours respectfully,

W. W. HAND.

(102) Did you receive that letter?

A. I presume so.

Q. Do you remember whether a check in payment of the assessment was enclosed, as therein stated?

A. I should presume so, because the money was paid.

(Letter just referred to is marked for identification "Ex. 23, May 25, 1900. R. B. S.")

Q. You were not advised of the dealings between George B. Delamater and George W. Delamater on one side and the Fidelity Insurance, Trust and Safe Deposit Co. on the other?

A. No.

Q. What instructions did you receive, if any, with reference to putting in the name of W. W. Hand the stock that had originally stood in the names of George B. and George W. Delamater?

A. I don't remember that there was anything, only the direction to make the transfer.

Q. The instructions came to you from W. W. Hand, did they?

A. The letters show from the Fidelity Company.

Q. Have you any letters with regard to that?

A. I don't know. The business was done through the Fidelity Company, I think.

Q. With reference to sending the certificate to the Fidelity Company when were the memoranda written up on the stub?

A. It is supposed to be written January 17, 1891. (103)

Q. Did you see them written?

A. I don't remember that I did. I might have done so.

Q. Then your only knowledge in connection with the matter comes from what you see upon the papers?

A. Yes; that is Mr. Kepler's handwriting.

Q. Your only knowledge comes from what you see on the papers?

A. I don't remember only in that way.

Q. Your only knowledge of the transaction comes from what you see upon the papers? Is that so?

A. Yes, sir. Of course I know that they were forwarded, but this states when they were forwarded.

Q. Are you prepared to say that any stockholder of the company ever saw that memoranda upon the stub of certificate No. 180 when the bank was still in business?

A. I don't know, I am sure.

Q. Are you prepared to say that any creditor of the bank ever saw that memoranda upon the stub of certificate No. 180 while the bank was in business?

A. I don't remember; they might have done so.

Q. Do your answers apply likewise to the memoranda on the stub of 181 and 183?

A. Yes, sir. I know that the stock was forwarded and I believe at that time.

Q. Between January 15, 1891, the date of the old certificate aggre- (104)
gating 230 shares in the name of W. W. Hand, and February 1, 1893, the date of the new certificate for 172½ shares in the name of W. W. Hand, was the old stock certificate book in your charge?

A. Yes.

Q. Where did you keep it?

A. In the safe, in the vault.

Q. And it was not left lying out on the counter to be seen, except on application to you?

A. No.

Q. Do you remember any such application having been made to you for the purpose of seeing in whose name these shares of stock were?

A. I can't remember.

Re-direct Examination by Mr. Waters.

Q. Have you any doubt as to the writing upon the stubs numbered 180, 181 and 183 by Mr. Kepler?

A. No, I think Mr. Kepler wrote them.

Q. Have you any doubt as to when he wrote them?

(Defendant objects to the question as incompetent, irrelevant and immaterial.)

A. No, I have not.

Q. Have you any doubt but that they were written by him at the
(105) time specified by him January 17, 1891?

(Defendant objects to the question as incompetent, irrelevant and immaterial. It is not stated in them when they were written.)

A. I have no doubt of it.

Q. These two stock certificate books and the stock ledger of the bank were open for the inspection of the creditors and stockholders of the bank at all times while you were cashier during the business hours of the bank?

(Objected to as already covering the examination in chief and not re-examination.)

A. Yes; all that was necessary was to ask to look at them. Of course, we didn't leave them lying around.

Q. You knew that under Section 5210 of the Revised Statutes of the United States you were required as cashier of the bank to have the list of stockholders open to the inspection of the creditors and shareholders of the bank during the business hours of the day?

A. I was.

Q. And you kept those books open for the inspection of the creditors and stockholders pursuant to that law?

A. Yes, sir; it is the regular way of business, and, of course, to fulfill the law too.

Re-Cross Examination by Mr. Dickson.

(106) Q. You don't mean to say that you had any other list other than the book that has been shown here?

A. No.

Q. And that you say was kept ordinarily in the vault?

A. Yes, sir.

Q. And the public at large had no access to the vault?

A. Of course not.

(Signed) JOSEPH I. TOWN.

Also deposition of Matthew Griswold, as follows:

"MATTHEW GRISWOLD, a witness produced on behalf of the plaintiff, being first duly sworn, deposes and says as follows:

Questions by Mr. Waters:

Q. You have stated your name to be Matthew Griswold?

A. Yes, sir.

Q. Kindly state where you reside?

A. Erie, Pa.

Q. How long have you resided there?

A. Since 1868.

Q. Were you president of the Keystone National Bank of Erie?

A. At one time.

Q. Do you remember when you were elected president?

A. I think it was 1892, I'm not positive; 1892 or 1893; Mr. Downing resigned and I was elected at the same meeting.

Q. You succeeded J. F. Downing as president?

A. I did.

Q. Did you continue as president until the close of the bank? (107)

A. I did.

Q. It closed its doors about June 29, 1897?

A. Yes, sir.

Q. During the time that you were president from 1892 or 1893 until June 29, 1897, when it closed its doors for business, was the bank doing a regular banking business accepting deposits and making loans?

A. So far as I know.

Q. It was open for business during that time during the business hours of every day, except on holidays?

A. Yes, sir.

Q. Do you know Mr. Joseph I. Town who has just testified?

A. I do.

Q. Was he cashier of the bank at any time while you were president?

A. I think he was.

Q. Was he director of the bank while you were president?

A. He was.

Q. Did you hear his testimony?

A. In part.

Q. Who succeeded Mr. Town as cashier?

A. Mr. F. V. Kepler

Q. Do you remember the date he became cashier?

(108) A. I think it was January 14, 1893.

Q. And he was cashier until?

A. Until the January before the bank failed—January, 1897.

Q. Are you familiar with Mr. Kepler's handwriting?

A. Moderately familiar. I will state here that his handwriting is a little peculiar and varied somewhat.

Q. I show you stubs in the book which has been offered in evidence as the stock certificate book of the bank and for the purpose of identification it is marked on the inside of the front cover 'Ex. 24 May 25 1900 R. B. S.' and ask you whether the following words 'Sent to Fidelity Insurance, Trust and Safe Deposit Co. Phil'a, Pa. 1/17/91' written on the stubs for certificates Nos. 180, 181 and 183 of the stock of the bank, and identified as 'ex 2, 3 and 4' is or is not written in the handwriting of F. V. Kepler?

A. It is my impression that they are, but I am not positive. I am not a handwriting expert. It appears like his handwriting.

Q. I show you a book which has been identified as the new certificate of stockbook of the bank, and which is now for the purpose of better identification marked on the inside of the front cover of the book 'Ex 25 May 25, 1900, R. B. S.' and show you stub certificate No. 236 marked for identification 'ex 12 May 25, 1900 R. B. S.,' and ask you

(109) whether the handwriting on it is that of Mr. Kepler?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. I couldn't identify it, sir.

Q. I call your attention to the writing on the bottom of the stub in these words: 'Sent by reg. mail 2/7/93' and ask whether you can identify that as being in the handwriting of F. V. Kepler, late cashier of your bank?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. It is my impression that that is his handwriting.

Q. Do you identify these two books as stock certificate books of the bank?

A. I think I can. I have often seen them in there. (Looks at the books.) Oh, there is no question about it. I identify them as the stock certificate books of the bank.

Q. I hand you a book and ask you what this book is, if you can identify it?

A. I understand this to be the stock ledger of the Keystone Bank. I have often seen it in the bank and have had it in my hands.

Q. It is the same book that has been identified by Mr. Town and marked for identification 'ex 19 May 25, 1900 R. B. S.' is it not?

A. I think it is. (110)

Q. I call your attention to the writing on page 96 of this stock ledger written over the name W. W. Hand and written with pencil in words as follows: 'Fidelity Trust and Safe Deposit Co., Phil'a, Pa.' Can you state in whose handwriting these last named words are written?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. It is my impression that Mr. Kepler wrote those words.

Q. You mean F. V. Kepler, late cashier of the Keystone National Bank of Erie?

A. Yes, sir.

Q. Is Mr. Kepler living?

A. No, sir.

Q. Do you know when he died?

A. Not exactly. I think it was in the early summer of 1898.

Q. You were president of the bank in 1893, 1894, 1895, 1896 and 1897?

A. Yes, sir.

Q. I show you the following letters, one dated Phil'a, Jan. 24, 1893, marked for identification 'Ex 11,' one dated Phil'a, Feb. 10, 1893, marked for identification 'Ex. 14,' one dated Nov. 13, 1893, marked for identification 'Ex 15,' one dated March 20, 1894 marked for identification 'Ex 16', this letter being addressed to you as president of the (111) bank; one dated Phil'a March 17, 1897 marked for identification 'Ex 17', and one dated Phil'a, October 14, 1897 marked for identification 'ex 18', All of these letters were addressed either to F. V. Kepler, Esq., cashier Keystone National Bank, yourself as president, or F. M. Lamb, cashier, all of them being written by the Fidelity Insurance Trust and Safe Deposit Company by Charles Atherton as either treasurer or vice-president of that company. Kindly state whether you can identify these letters as letters coming to the bank in the regular course of business and filed with the records of the bank at or about their respective dates?

A. The answer that I can make will have to be an explanation. I was away from town and the bank most of the years 1893 and 1894, and these letters, while they may have been received, I cannot recollect

as having been brought to my attention. The letter that is addressed to me personally under date of March 20, 1894, I was away from home at that time. My son had directions to hand anything of the kind over to the bank, and I presume they went that way. I don't recollect receiving it at all. This letter to Mr. Lamb October 14, 1897 I think I think I saw that letter.

Q. How about the one of March 17, 1897?

A. This one I don't remember, but my impression is strong that
(112) I saw this letter of October 14, 1897. I was away in Washington, having been elected to Congress for the fifty-second and fifty-fourth congresses. I have not the slightest doubt but what these letters were received by the bank in due course of mail.

Defendant objects to the question and answer as incompetent, irrelevant and immaterial, he having shown no knowledge.

Cross-examined by Mr. Dickson:

Q. You were not informed of the relations between George B. Delamater and George W. Delamater and the Fidelity Insurance, Trust and Safe Deposit Company?

A. Only so far that I knew that they had transferred their stock.

Q. But why, or for what consideration, you did not know?

A. No, sir, I did not.

Q. You knew that W. W. Hand was a clerk in the office of the Fidelity Company?

A. I don't think I did, of my own personal knowledge. I knew he was reported as being that.

Q. That was the general knowledge of the fact?

A. It was understood that the stock was in the name of Mr. Hand, and he was in the Fidelity Company, but I couldn't swear that I ever saw him there.

(113) Q. Did you have any interview with any officer of the Fidelity Company?

A. At one time I was in the bank, but my recollection is quite indistinct. It was about the time of this assessment.

Q. Whom did you see there?

A. My impression is that I saw the president of the bank.

Q. Do you remember his name?

A. I can't name him.

Q. Was it Mr. Guest?

A. I wouldn't like to say.

Q. He is a gentleman about seventy years of age?

A. He was an elderly man.

Q. Didn't he inform you at that time that the stock had been pledged with his company as collateral for a loan made by his company to Delamater and Company?

A. I don't think he did.

Q. You mean you don't remember?

A. I don't remember that he made any such statement. The facts are very indistinct, as I stated first.

Q. I understand the effect of your testimony to be that you had but very little part in the active management of the bank?

A. That is right.

Q. During the latter years of its history?

A. That is right, sir.

Mr. Johnson: The re-direct examination is not pressed and I will not read it. (114)

Re-cross-examination by Mr. Dickson:

Q. Was this so-called impression of which you speak communicated directly to you by the officers, or did you merely understand that it was in the air?

A. From the knowledge I had of the bank's business, the transfer of the stock from Mr. Delamater, from the fact that the correspondence was with the Fidelity and that Company paid the assessment of 25 per cent., from the fact of my calling there in reference to that reduction of capital, more particularly the first $50,000, from these facts I drew the inference that the stock belonged to the Fidelity Insurance and Trust Company of Philadelphia.

Q. When you say that there was a supposition among the executive officers of the bank that the Fidelity Company was really the owner, you mean that was their inference from these facts of which you have spoken?

A. That was mine, anyway.

(Signed) MATTHEW GRISWOLD."

Also deposition of Edward C. Moore, as follows: (115)

"EDWARD C. MOORE, a witness produced on behalf of the plaintiff, being first duly sworn, deposes and says as follows:

Questions in chief by Mr. Waters:

Q. You have stated your name as Edward C. Moore. Kindly state where you reside?

A. At Erie, Pa.

Q. How long have you resided at Erie, Pa.?

A. About 32 years.

Q. What is your business?

A. I am treasurer of the Erie City Iron Works.

Q. Did you know of the Keystone National Bank of Erie?

A. Yes, sir.

Q. Did you have anything to do with the bank?

A. I was the cashier of the Erie City Iron Works and had charge of their banking business there for a number of years.

Q. The Erie City Iron Works kept an account with the Keystone National Bank?

A. Yes, sir, they had an account there from about the time the bank started until it closed.

Q. It closed its doors for business on June 29, 1897. Was the bank at that time indebted to the Erie City Iron Works in any amount as a depositor?

(116) Defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, sir, we had a deposit there of about $30,000.

Q. And your company had been a depositor of the bank continually for more than thirty years, had it not?

A. I don't know when the bank opened, but I am quite sure that we started in right at the opening of the bank way down right up to the finish.

Q. Was it your habit to make daily deposits at the bank?

A. Yes. I don't suppose I missed ten days in the year—any year for the last ten years.

Q. And your average daily deposit was what?

Defendant objects to the question as incompetent, irrelevant and immaterial.

A. I couldn't tell you now. Anywhere from one thousand to five thousand dollars.

Q. During all these years prior to June 29, 1897, the bank was a going concern, receiving deposits?

A. Yes, sir.

Q. And discounting paper?

A. Yes, sir.

Q. Making loans and doing a general banking business?

A. Yes, sir.

(117) Q. Have you been paid any dividends by the Comptroller of the currency on your deposit account which you had at the time it closed?

A. Yes, we have drawn out fifty per cent.

Q. The bank still owes you fifty per cent.?

A. Yes, sir.

Not cross-examined.

(Signed) EDWARD C. MOORE."

Also deposition of John O. McClintock, as follows:

"JOHN O. McCLINTOCK, being first duly sworn deposes and says:

Examined by Mr. Waters.

Q. You have stated your name to be John O. McClintock; kindly state your place of residence?

A. Meadville, Pennsylvania.

Q. You are a practicing attorney in Meadville, state how long you have been practicing and residing in Meadville?

A. I have been engaged in the active practice for 21 years. I have resided in Meadville 35 years.

Q. Do you know of the firm of Delamater & Company?

A. I knew of such a firm. It was engaged in the banking business in this city prior to December 5th, 1890.

Q. State what occurred at that time with reference to that firm.

A. A deed of assignment for the benefit of creditors of the firm was (118) made on the 5th day of December 1890 to George W. Haskins and John O. McClintock (myself).

Q. Have you that deed with you?

A. Yes, sir.

The deed of assignment produced by witness and offered in evidence. A true copy thereof, certified by the Recorder of Deeds of the County of Crawford, Pennsylvania, by agreement of counsel present, in lieu of the original deed is attached to this deposition and made part thereof and marked by the Notary Public for purposes of identification 'Exhibit 1, May 24th, 1900, S. M. J.'

Mr. Dickson on part of defendant objects to the offer of the foregoing deed of assignment as incompetent, irrelevant and immaterial.

Q. You were a joint assignee of Delamater & Co. with George W. Haskins were you not, under this deed?

A. Yes, sir.

Q. As assignee, did there come into your possession 230 shares of the capital stock of the Keystone National Bank of Erie, Pennsylvania?

A. No, sir.

Q. Do you know anything about that stock?

A. We (the assignees) had notice from the assignors that the
(119) assignors were the owners of 230 shares of the capital stock of the Keystone National Bank of Erie, Pennsylvania, and that this stock was pledged as collateral security with the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, to secure a loan of $15,000, payable in sixty days from November 15th, 1890. Probably with interest.

Q. Were you charged, as assignees, with that stock?

Mr. Dickson on part of defendant, objects to the question as informal.

A. We were charged in the inventory and appraisement of the assets of Delamater & Co. with 'Equity in $23,000 stock of the Keystone National Bank of Erie, Pennsylvania, collateral for loan of $15,000, valued at ..... $8,000.'

Q. What was the date of that inventory and appraisement?

A. Completed and dated January 3, 1891. It was filed 'in the matter of assignment of Delamater & Co. to George W. Haskins and John O. McClintock for the benefit of creditors in the Court of Common Pleas of Crawford County, Pennsylvania as of No. 52, February Term, 1891, and was filed January 5, 1891.

Mr. Dickson on part of defendant objects to secondary evidence of the inventory and appraisement as the inventory and appraisement are themselves the best evidence.

(120) NOTE: It is agreed by counsel present, subject to Mr. Dale's approval, that a production at the trial of the original record or a certified copy thereof be waived, the papers having been produced at the taking of these depositions.

Q. I show you a certificate for 100 shares of the Capital stock of the Keystone National Bank of Erie, Pennsylvania, dated March 1st, 1865 No. 21 and issued in the name of George B. Delamater, marked for identification 'Exhibit 4, May 23, 1900 L. E. H.,' also attached to this certificate an assignment and power marked for identification, 'Exhibit 5, May 23, 1900 L. E. H.'; also a certificate of the same bank for 30 shares issued in the name of George B. Delamater, dated April 6th, 1871 and numbered 57, and an assignment on the back thereof marked for identification 'Exhibit 6, May 23, 1900 L. E. H.' also two certificates for 50 shares each of the capital stock of the same bank, dated February 4th, 1889 issued in the name of George W. Delamater Nos. 168 and 169 marked for identification, 'Exhibit 1 May 23, 1900 L. E. H.' and 'Exhibit 2 May 23, 1900 L. E. H.,' these four certificates calling for, in the aggregate 230 shares of stock of the said bank. Will you kindly look at these certificates and state what you know in regard to them?

(121) A. I cannot say that I know anything in regard to these certificates. I have never seen these certificates until to-day. All I know in regard

to them I have from the statements of the assignors, Delamater & Co. and of the Fidelity Insurance Trust and Safe Deposit Company. These certificates undoubtedly represent the stock which the assignors informed the assignees was owned by them (the assignors) and were pledged for the loan of $15,000 at the time the assignment was made. The certificates were pledged to the Defendant Company.

Q. You will see that these certificates are in the names of George W. Delamater and George B. Delamater. Can you say then that they represented stock belonging to Delamater & Co.?

Counsel for defendant objects to the question as calling for an answer as to facts not shown to be within the witness's own knowledge and also as calling for answer by way of inference.

A. I can. I can state why,—because of statements made to us as assignees by the assignors, of whom George W. Delamater and George B. Delamater were members.

Q. Kindly state what they told you in regard to this stock.

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial.

A. They informed us that the stock was the property of Delamater & Co. and that it had been pledged as collateral security for a loan at (122)
the Fidelity Insurance Trust and Safe Deposit Company at Philadelphia, Pennsylvania. There was no explanation as to why it was in the individual names. It was issued before the firm was organized.

Q. Who were the members of the firm of Delamater & Co.?

A. George B. Delamater, George Wallace Delamater and T. A. Delamater.

Q. Who was the active member of the firm?

A. George Wallace Delamater.

Q. On the assignment of these four certificates of stock you will note the name of W. W. Hand as vendee. Do you know Mr. Hand?

A. I do not. I never met him.

Q. Did the defendant in this action ever advise the assignees of Delamater & Co., of whom you are one, of the transfer of these four certificates on the books of the Keystone National Bank to W. W. Hand?

A. We had the information from one of the officers of the defendant company, a gentleman whom we met and to whom we were referred in the office of the company at Philadelphia that they had had this stock, these certificates, surrendered and had the stock reissued in the name of Mr. Hand. That is the only advice we had from the defendant company of that fact.

Q. Can you fix the date of that conversation with the officer of the (123)
Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia?

A. It was on the 30th day of April, 1895, or the 1st or 2d day of May, 1895.

Q. Where did this conversation take place?

A. At the place of business of the defendant company in Philadelphia.

Q. Who was with you?

A. Mr. Haskins, co-assignee.

Q. You both went to the office of the defendant together and what was said by you?

A. Yes, we went together into the office of the company to see the proper officer of the company in relation to this asset and to ascertain whether there was any excess or equity from which the assigned estate of Delamater & Co. could realize for the creditors. On making known the object of our call at the counter, we were referred to a particular officer of the company and directed to apply to him. We did so. We made known the object of our call and this gentleman, whose name I do not recall, but who was represented to us to be an officer in charge of this matter, then stated to us that the certificates of stock which had
(124) been pledged by Delamater & Co. had been surrendered and that new certificates had been issued to the defendant company in the name of W. W. Hand, an employee of the company. He also stated that an assessment had been called of twenty-five per cent. on this stock; that the stock had been reduced twenty-five per cent. and surrendered in pursuance of that call. That in addition thereto the defendant company had paid an assessment of twenty-five per cent. on the balance; that the assessment so paid had been paid, I think he said, in 1893; that they owned the balance of the stock. Having learned this much from the officer of the company we saw at once that there was no prospect of recovering anything from the stock for the creditors of Delamater & Co.

Counsel for defendant moves that the last sentence of the answer be stricken out as incompetent, irrelevant and immaterial.

Q. Had you been advised by the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia or by W. W. Hand representing that company, before this meeting about the first of May 1895 of which you have spoken in your last answer, of the transfer of stock to W. W. Hand, the payment of the assessment of 25% in cash upon the stock and of the acceptance by said defendant of one hundred seventy-two and one-half shares in lieu of the two hundred and thirty shares?

(125) A. We had not.

Q. State whether or not you had ever consented to or ratified such transfer and payment of the assessment by the defendant or by W. W. Hand its representative as assignees of Delamater & Co.?

Mr. Dickson for defendant objects to the question as incompetent, irrelevant and immaterial.

A. No.

Q. State whether, or not, you had ever authorized the Fidelity Insurance, Trust and Safe Deposit Company or W. W. Hand its representative, as assignee of Delamater & Co., to pay an assessment of twenty-five per cent. upon the two hundred and thirty shares of capital stock of the Keystone National Bank referred to in this deposition, or to vote for a reduction of its capital stock from $250,000 to $150,000 or from $200,000 to $150,000 and the acceptance of 172½ shares of the new stock in lieu of the 230 shares of stock represented by certificates No. 21, 57, 168 and 169 of the Keystone National Bank which have been shown to you in the names of George W. Delamater and George B. Delamater.

Mr. Dickson on part of the defendant objects to the question as incompetent, irrelevant and immaterial.

A. We never did authorize any such action as referred to in the question. We were never consulted by the defendant company in (126) relation thereto and had no opportunity to authorize or disapprove of the action taken.

Q. When was your first account as assignees of Delamater & Co. filed?

A. January 16th, 1892.

Q. You have before you the first account filed. Kindly state what you said with reference to this charge against you of an equity of $8,000 in the 230 shares of stock aforesaid held by the defendant?

Mr. Dickson on part of the defendant objects to the question as incompetent, irrelevant and immaterial and as not the best evidence.

A. We claimed credit in item No. 36 of our first partial account for 'Equities in stocks and bonds pledged as collateral for the reason that the same are unadjusted, as follows:

$23,000 stock in the Keystone National Bank of Erie, Pa., pledged for a loan of $15,000, appraised at $8,000.'

Q. You have refreshed your memory by looking at this first partial account filed January 16, 1892. Have you personal recollection of the statement which you have made in your foregoing answer?

Mr. Dickson counsel for defendant objects to the question as incompetent, irrelevant, immaterial and informal.

A. Yes, I have personal recollection to that fact without reference (127) to the account. This account is filed in the matter of assignment of Delamater & Co. bankers, in the Court of Common Pleas of the County of Crawford and State of Pennsylvania, No. 52, February Term, 1891.

It is agreed by counsel present, subject to Mr. Dale's approval, that a production at the trial of the original record or a certified copy thereof be waived, the papers having been produced at the taking of these depositions.

Q. Did you make a further account in the matter of the assignment of Delamater & Co. as assignees? If so, state when and what, if anything was said, to the best of your recollection, in that account in regard to the charge made against you on account of the 230 shares of stock of the Keystone National Bank heretofore referred to in this deposition.

Mr. Dickson, counsel for defendant, objects to the question as incompetent, irrelevant and immaterial and calling for an answer that will not be the best evidence.

A. On the 13th of July 1896 we, the assignees of Delamater & Co. filed in the above mentioned case our final account. In this final account we were charged with this item referred to in the question as follows:

(128) "Equities in stocks and bonds pledged as collateral on loan unadjusted as follows:"

Mr. Dale: I object to that entry. A statement made by the gentlemen in the account, and not communicated to us, is incompetent as against this defendant.

Mr. Johnson: We want to show that this gentleman called at the office of the Fidelity Company, that he was told they were the owners of the stock; he called for the purpose of knowing how to deal with the thing in which he charged himself with the equity, and after this conversation, and in pursuance of it, he filed his account and asked credit for that because it was owned by the other people, because he had no interest in it, and it was allowed.

Mr. Dale: Whatever might have taken place between himself and the officer of the Fidelity Company is competent. Whether he claimed credit in any specific form for this equity is a matter that has no bearing upon the status of this defendant.

The Court: It seems to me it is competent, if for no other reason, as corroboration of his account of the conversation between himself and the officer of the company.

Mr. Dale: Not in the legal sense. That conversation may bear the interpretation that his legal rights had been ended, and it may bear the
129) interpretation that by reason of things that occurred practically there was no equity. In the conversation this witness does not undertake to state any fact from which the extinction of the legal right of Delamater & Company as pledgors can be inferred. He undoubtedly had come to the conclusion there was nothing in the stock in fact, no market price over and above the amount of the debt. His claiming credit in the account is equally consistent with the fact there was no equity in it as it is with the contention that something had occurred which legally excluded him. And there is no pretense it was communicated to the defendant, and it is absolutely incompetent.

The Court: If it is susceptible of either interpretation then it will do no harm to either side to go in.

Mr. Dale: What a man does not in the presence of the other party is not competent to explain a previous conversation.

The Court: Suppose there is a dispute as to what a conversation absolutely was, and you show a course of conduct by one of the parties which is consistent with the conversation having been of a particular kind. Is not that admissible?

Mr. Dale: Not as against the other party, if the other party has nothing to do with the subsequent course of dealing.

Mr. Johnson: I certainly have a right to show at the time the bank (130)
was solvent that we acquiesced in what they told us about their ownership and abandoned it, to show the status, because either the Delamaters or this company are responsible for this assessment. If they told the Delamaters' assignee that they had converted the stock, and if the Delamater assignee acquiesced in that then at the time it took place in 1897 the assigned estate of Delamater could not have been held responsible for the assessment. Therefore it is entirely competent for us to show that we acquiesced in the position that at that time was assumed, as being the owners, and asked the creditors to be discharged by the Court from any further responsibility.

The Court: I will admit it.

Mr. Dale: I ask an exception to the admission of the question and answer referred to, which are found on pages 9 and 10 of the deposition of John O. McClintock, with reference to the credit entry in the account.

"A $23,000 stock of the Keystone National Bank of Erie, pledged for loan of $15,000 appraised at $8,000.' And we were credited with item No. 48 as follows:

'Accountants claim credit for the item of $23,000 Keystone National Bank stock pledged for loan of $15,000 charged at $8,000, said stock having been converted by the holder of the note and said stock (131)
having been assessed to the amount of 25% of its face value did not sell for enough to pay the debt for which it was pledged.'

NOTE: It is agreed by counsel present, subject to Mr. Dale's approval, that a production at the trial of the original record or a certified copy thereof be waived, the account having been produced at the taking of these depositions.

Q. Was this credit in your second and final account allowed by an order of the Court?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial and calling for an answer which is not the best evidence.

A. It was. The account as filed was finally confirmed by the Court."

Mr. Dale: I make here the same objection.

The Court: There is part of that claim of credit you have just read which contains a statement I have not had in my mind at all. I ought to have seen the answer before I ruled on it. I supposed it was simply taking credit for that amount. As far as that goes I adhere to the ruling. As to that statement there about having converted and having paid an assessment, I was clearly in the wrong.

(132) Mr. Johnson: Suppose your Honor will admit so much as says "Accountants claim credit for the item of $23,000 Keystone National Bank stock pledged for loan of $15,000, charged at $8,000," and that the account was finally confirmed by the Court; and exclude the residue, and give me an exception.

(Exception noted for plaintiff to the exclusion of the confirmation by the Court.)

Mr. Dale: I also object to the succeeding question and answer with respect to this confirmation.

The Court: I do not think that is material and the objection is sustained.

(Exception noted for plaintiff to the exclusion of the confirmation by the Court.)

Recess until 2 o'clock P. M.

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2 o'clock P. M.

The reading of the deposition was resumed as follows:

Q. Do you know Charles Atherton of Philadelphia, who, I think it will be admitted by the defendant, was either treasurer or vice-president of the defendant company in 1895?

A. I do not.

(133) Q. Can you describe the officer of the defendant company that you spoke to at that time?

A. My recollection of the appearance of the gentleman is that he was a man from 50 to 60 years of age, probably, medium size, light complexion, rather spare face. I think he wore a beard, but not a heavy beard, rather a slow spoken, mild mannered man.

Q. Would you know him if you saw him again?

A. I do not know. I might and I might not. I never saw the man but that once and we were in his presence not to exceed ten minutes. He was on the inside and we on the outside of his office counter while we talked to him. He talked to us as one authorized to speak on the subject concerning which we had called to see the company.

Mr. Dickson, counsel for defendant, moves that the latter part of the above answer be stricken out as stating a conclusion and not a fact.

Q. Did he have a separate office or room?

A. My recollection is that he had.

Q. Was it in the rear?

A. I was about to say that it was in the rear of the general accounting part of the institution or the general accounting room.

Cross-examination by Mr. Dickson.

Q. You spoke of having information from the assignors in regard (134)
to the pledging of the Keystone National Bank stock made to the Fidelity Insurance, Trust and Safe Deposit Company. Was that information conveyed to you in writing?

A. Partly and partly verbally. A memorandum was made by Mr. George W. Delamater and a statement made verbally to us.

Q. Have you that memorandum at hand?

A. Yes.

Q. Please produce it.

Q. I have it here (witness produces paper). 'Memorandum of the Assets of Delamater & Co.' produced by the witness.

Q. In whose handwriting is this memorandum?

A. George W. Delamater's. On the second page of the memorandum appears 'Keystone National Bank of Erie, Pennsylvania, stock $43,000; on deposit at the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia $23,000, to secure a loan to Delamater & Co. for $15,000.'

Q. Did you before the interview with the officer of the Fidelity Insurance, Trust and Safe Deposit Company of which you have spoken receive any communication from the Fidelity Insurance, Trust and Safe Deposit Company in regard to this matter?

A. Yes.

Q. Have you that communication at hand? If so, please produce it.

A. We received a letter from the Fidelity Insurance, Trust and (135)
Safe Deposit Company of Philadelphia dated May 5th, 1891, signed R. Patterson, Vice-President, which read,—

'Philadelphia, May 5th, 1891. Assignees of Delamater & Co., Meadville, Pennsylvania. Gentlemen:—I herewith enclose a copy of a note addressed this day to Delamater & Co. As the business concerns you as their Assignee, I trust you will be able to settle the note and avoid the necessity of selling the collateral.

Yours resp'ly,

(Signed) R. PATTERSON,
Vice-President.'

Accompanying this letter was a letter dated the same date reading as follows:

(Copy.) 'Philadelphia, May 5th, 1891.

Messrs. Delamater & Co.,
Meadville, Penn'a.

Gentlemen:—I have to renew the call heretofore made on you for payment of your note of $15,000 dated Nov. 15, 1890, due at sixty days. The time expired Jan. 17th, last. The note carries 6% interest from its date. It is secured by 230 shares of the Keystone Na. Bank of Erie, and if we cannot secure prompt payment, for the note
(136) and interest I have to notify you that we shall proceed to sell the collateral at auction.

Yours respectfully,

(Signed) R. PATTERSON,
Vice-Prest.'

Q. Mr. George W. Delamater stated yesterday that a certain letter concerning which he was interrogated and addressed by the Fidelity Insurance, Trust and Safe Deposit Company under date of December 17th, 1890, to Delamater & Co. or their assignees, at Meadville, Pa., might have been received by his assignees. Have you any knowledge of that letter?

A. I do not find such a letter among our papers in relation to this claim. I have looked among our papers since my attention was called to the fact that my testimony was desired for all letters from the defendant company in relation to this matter and have not found any other than those that I have read.

Q. Have any letters written by the defendant company to Messrs. Delamater & Co. been handed to you?

A. The letter dated May 5, 1891, a copy of which I read, addressed to Delamater & Co. is in our possession.

Q. From whom did you receive it?

A. My recollection is that it came to our post office box and was received by us in that way.

(137) Q. In its original envelope or from Delamater & Co.?

A. In its original envelope. After the assignment most of the letters of Delamater & Co. came to our box.

Q. Was the loan secured by this pledge of the Keystone National Bank stock ever paid off?

A. I have no knowledge of it ever having been paid.

Q. Was it paid in the distribution that has been made by you and Mr. Haskins as assignees from the estate assigned to you?

A. This indebtedness participated in the first distribution that was made of the assets of Delamater & Co.

Q. How much was that dividend?

A. 5.6%. The dividend paid on this claim was $795.60.

Q. Do you know Mr. Patterson or Mr. Atherton by sight?

A. I do not. I do not know them by those names. I do not know those men.

Q. Do you know what officer of the Fidelity Insurance, Trust and Safe Deposit Company it was you saw at the place of business of the Trust Company?

A. I cannot state that. I cannot state the office the gentleman held to whom we were referred on this subject and with whom we had the conversation.

Q. I understood you to say you did not know his name? (138)

A. We may have been given his name at the time, but I do not recollect it.

Re-direct-examination by Mr. Waters.

Q. State whether, or not, the conversation you had with the officer of the defendant company on or about May 1, 1895, and the letters which you have produced at the taking of this deposition at the request of the counsel for the defendant dated May 5, 1891, from the defendant company to you as assignees of Delamater & Co. embrace every communication that you have had with the Fidelity Insurance, Trust and Safe Deposit Company with reference to the 230 shares of stock of the Keystone National Bank of Erie, Pennsylvania, in the deposition referred to.

A. No. I will not say that. We may have had some other communications from them that I am not able to find. I think we had some other communication with them but we had no communication with them regarding their action relating to and disposition of this stock.

Re-cross-examination by Mr. Dickson.

Q. What other communication have you, as assignee of Delamater & Co., received from the Fidelity Insurance, Trust and Safe Deposit Company either directly or through the medium of your assignors?

A. I do not know of any other communication received through the (139)
medium of the assignors. We received a letter direct from the defendant company dated July 7th, 1892, which read as follows:

'Philadelphia, July 7th, 1892.

Gentlemen: We acknowledge the receipt of yours of July 6th and herewith enclose to you a copy of a letter which we have this day addressed to F. P. Ray, Esq., the Auditor.

Yours truly,

(Signed) R. PATTERSON,
V. Prest.

'To Messrs. Geo. W. Haskins & John O. McClintock,
Att'ys of the Assigned Estate of Delamater & Co.,
Meadville, Pa.'

The letter enclosed the original whereof was addressed to Mr. Ray reads as follows:

'Philadelphia, July 7, 1892.

Dear Sir: At the suggestion of the Assignees, we send you statement of our claim against the assigned estate as follows:

Note of Delamater & Company drawn to our order for Fifteen
(140) Thousand Dollars dated November 15th, 1890, payable sixty days after date. As collateral security for the loan, we hold Two hundred and thirty (230) shares of the Keystone National Bank of Erie.

Of this note we enclose herewith a copy.

If any further proof of our claim is required, Please advise us and we will endeavor to comply with your request. I am

Yours very truly,

(Signed) R. PATTERSON,
V. Prest.

To F. P. Ray, Esq.,
Auditor of the Assigned Estate Delamater & Company,
Meadville, Pa.'

Q. Have you the original letter whereof a copy was enclosed in this letter of the Fidelity Insurance, Trust and Safe Deposit Company?

A. Yes.

Q. How did you obtain possession of this original?

A. It came to us from the auditor. He had filed his report with other proofs of claims made before him and this was the proof of defendant's claim for participation in the distribution.

Q. Please produce it.

(141) A. Letter produced by witness who reads as follows:

'Philadelphia, July 7, 1892.

Dear Sir: At the suggestion of the Assignees, we send you statement of our claim against the assigned estate as follows:

Note of Delamater & Company drawn to our order for Fifteen thousand dollars dated November 15th, 1890, payable sixty days after date. As collateral security for the loan, we hold Two hundred and thirty (230) shares of the Keystone National Bank of Erie.

Of this note, we enclose herewith a copy.

If any further proof of our claim is required, please advise us, and we will endeavor to comply with your request. I am,

Yours very truly,

(Signed) R. PATTERSON,
V. Prest.

To F. P. Ray, Esq.,
Auditor of the Assigned Estate of Delamater & Company,
Meadville, Pa.'

Q. Was Mr. Ray auditor as indicated in that letter?

A. He was.

Q. After endeavoring to recall the details of the office building of (142)
the Fidelity Insurance, Trust and Safe Deposit Company in Philadelphia and now that I have indicated to you by a penciled sketch the location of Mr. Atherton's office in the building, have you any more definite recollection who it was that you saw when you called on that company with reference to the loan of Delamater & Company?

A. I have no more definite recollection of the man or of the man's name than I stated in my examination in chief. The location as pointed out by you on the penciled sketch corresponds with the location of the gentleman in the office of the defendant company with whom we had our conversation.

Q. Have you the auditor's report as filed in re the assigned Estate of Delamater & Co.?

A. Yes. I have the schedule of distribution which is a part of the files in No. 52 February Term, 1891, of the Court of Common Pleas of Crawford County, Pennsylvania, and which I have here temporarily.

Q. Please produce it.

Witness produces the schedule.

Q. Please refer to claim of the Fidelity Insurance, Trust and Safe Deposit Company as shown in that schedule.

A. In this schedule the claim is No. 1156 and the name of the creditor is the Fidelity Insurance, Trust and Safe Deposit Company,

(143) amount of claim $15,300. Dividend $795.60. This was receipted by Arthur L. Bates, attorney in fact, on the record. The receipt was dated March 30, 1893.

(Signed) JOHN O. McCLINTOCK."

Also deposition of George B. Delamater, as follows:

"George B. Delamater a witness produced on behalf of the plaintiff, being first duly sworn, deposes and says as follows:

Examined by Mr. Waters.

Q. You stated your name to be George B. Delamater, now kindly state what is your residence and how long you have resided there.

A. My residence is at Meadville and I have resided there mainly for more than fifty years.

Q. You were a member of the firm of Delamater & Company doing a banking business in Meadville prior to December 5th, 1890?

A. Yes.

Q. Who were the other partners, Mr. Delamater?

A. George Wallace Delamater and T. A. Delamater, my sons.

Q. On December 5th, 1890, your firm made an assignment to Messrs. George W. Haskins and John O. McClintock for the benefit of creditors?

A. We did.

(144) Q. Who was the active partner of your firm?

A. My son, George Wallace Delamater.

Q. Do you know anything about 230 shares of the capital stock of the Keystone National Bank of Erie that was placed in the hands of the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia prior to the assignment as collateral for a loan to your firm?

A. I do not know anything about such stocks. I had owned a much larger quantity of this bank stock, but I do not know about this particular transaction.

Q. Was a demand ever made upon you personally by the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, the defendant in this action for the payment of a note of Delamater & Company bearing date November 15th, 1890, payable sixty days after date for $15,000?

A. No.

Q. Do you know a man in Philadelphia by the name of W. W. Hand, an employee of the defendant company?

A. I do not.

Q. Did the defendant company ever advise you that they had transferred two certificates of stock standing in your name of the Keystone National Bank of Erie, one No. 21 for 100 shares and one for (145)
30 shares and No. 57 dated respectively March 1, 1865, and April 6, 1871, which certificates I now show you and which are marked for identification "Exhibit 4, May 23, 1900, L. E. H.," and "Exhibit 6, May 23, 1900, L. E. H.," to W. W. Hand?

Mr. Dickson on part of the defendant objects to the question as incompetent, irrelevant and immaterial.

A. No, they never advised me anything about it.

Q. You then never consented or ratified that transfer in any way?

Mr. Dickson on part of defendant objects to question as incompetent, irrelevant, immaterial and leading.

A. No, I neither assented nor dissented, for I knew nothing of the transaction.

Q. You were never advised and therefore did not consent, ratify or authorize the payment by the defendant of an assessment of twenty-five per cent. in cash upon this stock in 1892 or authorize the defendant company or W. W. Hand its representative to vote the stock at any meeting of the stockholders of the said bank or to accept in lieu of the 230 shares 172½ shares of the reduced stock of the said bank to you?

The question objected to by Mr. Dickson on part of defendant as incompetent, irrelevant, immaterial and leading.

A. I was not advised in relation to the matter and expressed no (146)
consent or approval or dissent of the matter because I was not conferred with.

Q. You had no knowledge of what was done with that stock after the assignment on December 5th, 1890?

Objected to by Mr. Dickson as incompetent, irrelevant, immaterial and leading.

A. None.

The witness cross-examined by Mr. Dickson.

Q. Mr. Delamater, there are your signatures to the revocation of stock and power attached to the certificates, are they not?

A. It looks like my handwriting, I believe. (Referring to power attached to the certificates.) Both certificate No. 21 and certificate No. 57 shown witness. Yes, those are both my handwriting. I was asked to sign them and I signed them, I suppose, for I do not remember now.

Q. Have you any knowledge of letters addressed to your firm by the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, dated December 17, 1890, and May 5th, 1891, with reference

to a loan made to your firm by the Fidelity Insurance, Trust and Safe Deposit Company which was secured by the pledging of 230 shares of the Keystone National Bank stock of Erie, Pennsylvania?

A. I have not.

(Signed) GEO. B. DELAMATER."

(147) Also deposition of George W. Haskins, as follows:

"GEORGE W. HASKINS, a witness produced on behalf of plaintiff, being first duly sworn, deposes and says as follows:

Examined by Mr. Waters:

Q. Mr. Haskins, you are a practicing attorney in Meadville, Pennsylvania. Will you kindly state how long you have resided here and if you still reside here?

A. I have resided here since 1864 and reside here still.

Q. Do you know the firm of Delamater & Company, bankers, in Meadville, Pennsylvania?

A. I do.

Q. When did they do business?

A. They ceased doing business at the bank when they closed their doors on the fourth day of December, 1890, having made an assignment the next morning, December 5th, 1890.

Q. To whom did they make an assignment?

A. George W. Haskins and John O. McClintock.

Q. You are the George W. Haskins one of the assignees?

A. Yes.

Q. What was the date af that assignment?

A. December 5th, 1890.

Q. Do you know anything about 230 shares of the capital stock
(148) of the Keystone National Bank of Erie that was in the hands of the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, placed there by Delamater & Co. prior to their assignment?

A. At the time of the assignment I learned that this stock was pledged as collateral security to this Trust Company. The loan I believe was $15,000.

Q. Did the stock ever come into your hands as assignees of the firm of Delamater & Company?

A. It never did.

Q. Were you, as assignees, charged with that stock?

Mr. Dickson objects to the question as the record itself is the best evidence.

A. We were, and at the same time the amount of the loan was deducted from the total and we were charged with the equity which the appraisers supposed to be in the stock.

Q. What was the amount of that equity?

A. $8,000.

Q. The par value of the stock was $23,000, the loan $15,000 and was the appraisement of the stock at its par value?

A. I think so.

Mr. Dickson objects to the question and answer as the record is the best evidence.

Q. Did you have any personal knowledge at that time of the value of the stock?

A. I did not.

Q. The appraisement was made by others than yourselves? (149)

A. Yes, sir.

Q. Did you hear anything from the Fidelity Insurance, Trust and Safe Deposit Company, the defendant in this action, as assignees or otherwise, as to this stock by letter or letters?

A. I think they notified us of the indebtedness of the note and asked for payment and at the same time said they had the stock as collateral. That sort of information we had.

Q. I show you letter dated May 5, 1891, signed R. Patterson which has been called for by the defendant as you have just heard read by the former witness, are these the letters to which you refer?

A. Yes.

Q. Do you know of any letters since that time from the defendant company that were received by you?

A. I have no present recollection of any and have not personally examined the files. If we received any they were retained and are now on file.

Q. I will exhibit to you, Mr. Haskins, four certificates of stock, one No. 21 for 100 shares of stock issued by the Keystone National Bank of Erie to George B. Delamater, dated March 1, 1865; attached to which is a power signed by George B. Delamater: Another certificate No. 57 for 30 shares of the same bank issued to George B. Dela- (150)
mater with an assignment endorsed on the back by George B. Delamater: and two certificates Nos. 168 and 169 for fifty shares each of the same bank in the name of George W. Delamater dated February 4th, 1889, with an assignment attached thereto signed by George W. Delamater being the same certificates and powers marked for identification as 'Exhibits 4, 5, 1, 3, 2 and 6 respectively, May 23, 1900, L. E. H.' Kindly look at these certificates and assignments and state what you know in regard to them..

A. I never saw them before, neither the certificates nor the endorsements and I know nothing about them.

Q. Across the face of these certificates is written in ink 'Cancelled January 15, 1891, by the issue of certificates 181 on certificate No. 21; No. 183 on certificate 57; and 180 on certificates 168 and 169.' State what you know of the cancellation of those certificates.

A. I have no knowledge of it whatever.

Q. In the assignments attached to these certificates or on the back of them there is named W. W. Hand as vendee. State what you know in regard to W. W. Hand.

A. I do not know him at all. I learned in a conversation at the company's office that he was an employee of the company but I have no personal knowledge of him.

Q. When did you learn that he was an employee of the company?

(151) A. Either the last day of April, 1895, or the first or second day of May, 1895. Those three days I was in Philadelphia with Mr. McClintock. My recollection is that it was early in May but it was about that time.

Q. How do you fix the time as you do?

A. By memorandum of the time we were in Philadelphia. We were at the Supreme Court of the State and with reference to adjusting some matters pertaining to this estate.

Q. Who told you that he was an employee of the company?

A. Some other employee of the same company whom we found in the company's offices.

Q. An officer of the company?

A. A man to whom we were referred with reference to this subject and my recollection is that he was the Vice President of the defendant company. As to that I am not certain, however.

Q. Kindly state what this officer of the Fidelity Insurance, Trust and Safe Deposit Company said to you and Mr. McClintock at the time of that meeting?

Mr. Dickson on part of defendant objects to the question as incompetent, irrelevant and immaterial.

A. We called to adjust, if we could, the account and take up the stock. We were then informed by this gentleman to whom we were
(152) referred and who was in the office, that the stock had been transferred to Mr. Hand. Also that there had been an assessment on it of twenty-five per cent. which they had paid or arranged to stand, paid I think he said, and that in his opinion the stock was not worth the indebtedness and we failed to make any arrangement with him.

Q. Was this the first time that you knew or were advised as assignees or otherwise, that an assessment of twenty-five per cent in

cash had been ordered upon the capital stock of the Keystone National Bank of Erie, by the Controller of the Currency and paid by the defendant or W. W. Hand its representative?

Mr. Dickson, counsel for defendant, objects to the question as incompetent, irrelevant and immaterial.

A. I am not quite sure it is the first information as to the assessment, but it is the first information that an assessment had been paid by the defendant company or by any one representing them.

Q. And it was the first information you had that the stock had been transferred to W. W. Hand?

Counsel for defendant, Mr. Dickson, objects to the question as incompetent, irrelevant and immaterial.

A. Yes, it was a surprise to learn that they had transferred it to anybody. In their communication to us on the subject the transfer had not been mentioned and we assumed that the stock remained as it was. That was our understanding when we went there. (153)

Mr. Dickson for defendant moves to strike out the answer as irresponsive and incompetent.

Q. Was it a surprise to you to learn that they had paid an assessment of twenty-five per cent.?

Counsel for defendant objects to question as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. Did they tell you that the capital stock of the Keystone National Bank of Erie had been reduced and that they had accepted 172½ shares and surrendered the 230 shares, taking in lieu therefor 172½?

Counsel for defendant makes objection to the question as incompetent, irrelevant and immaterial.

A. That is my recollection of the statement. The numbers I do not recall but that the proportion had been reduced and that they had surrendered the original stock and accepted a reduced number of shares I am clear.

Q. Was that a surprise to you likewise?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial.

A. Yes, the whole matter was a surprise. I was surprised to find it in that situation and had had no information previous to that effect on the subject. (154)

A. Neither you nor Mr. McClintock, as assignees, had neither authorized such transfer of the stock to Mr. Hand nor payment of the assessment of twenty-five per cent. or the acceptance of the reduced number of shares and the surrender of the original shares?

Mr. Dickson on part of defendant objects to question as incompetent, irrelevant and immaterial.

A. Neither of us authorized it or knew of it or consented or ratified it. We knew nothing about it at all. The conversation to which I referred above at the banking office of the defendant company was the first information or knowledge we had of it.

Q. Have you filed a final account in the matter of the assigned estate of Delamater & Co.?

A. We have.

Q. You have stated that you are charged with $8,000 equity on account of your assigned interest in these certificates of stock, state whether, or not, you were finally credited with that amount.

Mr. Dickson objects as the record is the best evidence.

(155) A. We claim credit for this in our final account and the credit is allowed and the account was finally confirmed allowing the credit.

Q. I hand you the final and last account that you filed in that assigned estate and ask you to look at item No. 48 and refresh your memory in regard to it and state the matter therein set forth.

A. In our final account, item No. 48, the accountants claim credit for the item—

(At this point in the deposition of this witness the same matter occurs with regard to what was stated in the account as in Mr. McClintock's deposition; Mr. Dale makes the same objection, the same ruling is made as to the admission of part and the exclusion of the rest; and an exception is noted for the plaintiff for the exclusion of part and for the defendant for the inclusion of the part admitted.)

Q. After the visit of you and Mr. McClintock as assignees of Delamater & Co. to the Fidelity Insurance, Trust and Safe Deposit Company at Philadelphia about May 1st, 1895, state whether, or not, you as assignees claimed any further interest in the equity in that 230 shares of stock?

Objected to by counsel for defendant as incompetent, irrelevant and immaterial.

(156) A. We did not.

Q. State whether, or not, the officer of the defendant company whom you stated you thought was the vice president of the company, stated to you at the meeting just referred to, that this stock was the property of the company.

Mr. Dickson objects to question as incompetent, irrelevant and immaterial to the case.

A. He said it was; that it had been transferred to Mr. Hand. He gave the information as an employee of the company. I do not know that he said anything more on the subject than as I have stated.

Q. Was it from the statements made to you by the officer of the defendant company at that meeting at Philadelphia just referred to upon which you based your application for the credit of $8,000 in item to which you have just referred, stating that the stock had been converted by the holder of the note and said stock having been assessed to the amount of 25% of its face value and did not sell for enough to pay the note.

A. It was upon his information. That is the way he advised us and our knowledge afterward concerning the deficiency of stock. There was a distinct statement by the officer at the time that it was not worth the face value of the note. And we understood from him that it had been converted.

Defendant, by Mr. Dick-on, moves to strike out the last answer (157) as stating understanding and inference rather than what was said.

Q. Do you know of any demands made upon the firm of Delamater & Co. or any of its partners for the payment of this note of $15,000 dated November 15th, 1890, payable 60 days after date, after its maturity?

A. I do not.

Q. Do you know of any action in assumpsit or any other suit that was brought by the defendant company against Delamater & Company or any of its partners for the collection of this note at any time?

A. I do not know of any.

Witness cross-examined by Mr. Dickson:

Q. Repeat as accurately as you can what was said between Mr. McClintock and yourself and the officer of the Fidelity Insurance, Trust and Safe Deposit Company in the office of the company at the interview to which you have referred.

A. I do not know that I can repeat the words at all. We went into the office of the Fidelity Insurance, Trust and Safe Deposit Company and made known our business stating that we wished to make such adjustment as we could, or some adjustment if possible, with reference to the stock of the Keystone National Bank which they held in payment of the note. Our proposition was to turn over stock at its (158) face value to the amount of the note and have them turn over to us the excess and this gentleman to whom we had been referred and with whom we were holding the conversation informed us that the stock had been transferred and he immediately mentioned the name of Mr. Hand and said he was an employee of the company and that they could not entertain any such proposition and said that an assessment had been levied on the stock which they had paid and that the stock had been reduced and they did not think the stock worth the value of the note. They did not turn any of it over to us.

Q. Can you not recall that he said, 'This transfer of stock into the name of Mr. Hand has been for the purpose of getting better security'?

A. No, sir. I do not think he said that. I do not recall that he did say so, and the drift of the conversation nor its effect upon me at the time hardly warrants the inference that he did say that. I do not pretend to remember the words of the conversation except as I have stated.

Q. The loan was not paid either by the firm or by you as assignee, was it?

A. No, sir, only what they got out of the distribution.

(159) Q. When you proposed to withdraw a part of the collateral was not the refusal to permit this based upon the ground that the value of the collateral did not warrant such a withdrawal?

A. Partly. But that is the time that the answer was made that it had been transferred. When we made that proposition the answer was that the stock had been transferred and he added as I said a moment ago, the value of the stock in his opinion was not equal to the face of the note.

Q. I note that the dividend was allowed on $15,300. What is the excess of $300 over and above the face of the note?

A. As I did not make the computation or the distribution I can only assume that it was for interest.

A. Interest to the date of assignment?

A. I could not say without figuring. The note was a sixty-day note.

Q. Was the office in which you saw that officer of the company and in which you had this conversation in that part of the building where I have indicated to you on the penciled sketch Mr. Atherton's office is now located?

A. It was in that part of the building as indicated. Whether it was just where you pointed out I cannot say, but it was in that general location.

Q. Did you hear this officer's name?

(160) A. I have no doubt that I did, but have no distinct recollection of it.

Q. Do you know whether it was Mr. Atherton or Mr. Patterson?

A. I do not remember. My recollection as to the name is that the party to whom we first spoke called some gentleman by name and said that we wanted to attend to some business and he turned us to him and we went to him. My impression was that he was the vice president, but that is not a distinct impression.

(Signed) GEO. W. HASKINS."

Also deposition of George W. Delamater, as follows:

"GEORGE W. DELAMATER, a witness produced on behalf of the Plaintiff, being first duly sworn, deposes and says as follows:

Direct Examination by Mr. Waters.

Q. You have stated your name is George W. Delamater. Will you kindly state your residence?

A. Pittsburgh, Pennsylvania.

Q. How long have you resided in Pittsburgh?

A. It has been my headquarters for over two years, and my residence.

Q. Before coming to Pittsburgh where did you reside?

A. I was born and reared in Meadville, Pennsylvania, and remained there until June, 1891; then went to Tacoma, Washington, (161) where I remained until the summer of 1896; then I moved to Chicago and remained there until January 1st, 1898.

Q. Have you ever owned shares of stock of the Keystone National Bank of Erie, Pennsylvania?

A. Yes, sir.

Q. Do you remember the number of shares, or the par value?

Question objected to by counsel for defendant, as not the best evidence of the facts.

A. My recollection is the par value was $10,000. I do not remember now the number or par value of the shares.

Q. Is this the only stock of that bank that you owned?

Question objected to by counsel for defendant, as not the best evidence of the facts.

A. Yes, I think that is the only stock I owned.

Q. Was the certificate issued in your name?

Counsel for defendant objects, and says that the certificate should be produced.

A. I may say, as explaining the matter of the ownership of that stock, that I think the ownership was in Delamater & Co., and the certificate was issued to me as a matter of convenience.

Q. Will you look at the two certificates of stock, Nos. 168 and 169, the date of issue being February 4th, 1889, for fifty shares each of the Keystone Bank of Erie, of the par value of $100 per share, and state (162) whether or not these were the certificates of stock issued to you, in your name, referred to in your foregoing answer? (Certificates shown to witness.)

A. Yes, sir, those are the certificates.

Q. Attached to these certificates there is an irrevocable stock power. Kindly state whether the signature to this power, of Geo. W. Delamater, is your signature?

A. Yes, sir, that is my signature.

Certificate No. 168 is marked for identification, "Exhibit 1, May 23d, 1900, L. E. H."

Certificate No .169 is marked for identification, "Exhibit 2, May 23d, 1900, L. E. H."

The irrevocable stock power is marked for identification, "Exhibit 3, May 23d, 1900, L. E. H."

Q. Do you now own the stock represented by these certificates?

Defendant objects to this question as incompetent, irrelevant and immaterial, and further, as it involves the conclusion of law.

A. No, sir.

(163) Counsel for the defendant calls upon the plaintiff to state the purpose of this examination.

Counsel for the plaintiff states that the immediate object of the question is to show that the witness is not the owner, or not interested in the stock represented by the certificates referred to.

Q. Across the face of each of these certificates, Nos. 168 and 169, is written the words, in ink, "Cancelled by the issue of Certificate 180, January 15th, 1891." State what, if anything, you know as to the cancellation of these certificates of stock?

A. I know nothing about them.

Q. On the power of attorney to which you have identified your signature, and which is attached to these certificates of stock, Nos. 168 and 169, for 100 shares, beneath your name are the words "Signature guaranteed. The Fidelity Insurance, Trust and Safe Deposit Company, Charles Atherton, Treas." (Power shown to witness.) State whether or not, before to-day, you have ever seen those words written or stamped upon this power?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial.

(164) A. I do not think I ever saw them before. My impression is they were not there when I signed the paper.

Q. I show you this power of attorney attached to these two certificates, Nos. 168 and 169, and ask if you know in whose handwriting it is, aside from the printed part of it?

A. No, I do not recognize it. I only recognize, aside from my own signature, the signature of Harry R. Brown, who is the witness to my signature. He is now dead.

Q. W. W. Hand is named in this power as the transferee and was

dee. State if you know whether or not that name was written in the power when you signed it?

Counsel for defendant objects to this question as incompetent, irrelevant and immaterial.

The witness is shown the power and his attention is called to the fact that the name of W. W. Hand appears to be in a different handwriting from the rest of the body of the power.

Counsel for defendant objects, as no witness has testified in whose handwriting any part of the body of the power is written.

A. I have no recollection whether that name was in the power at the time I signed it. Indeed, I cannot remember whether the body of the power was filled in at all or not. I mean the blanks.

Q. Do you know anyone bearing the name of W. W. Hand? (165)

Counsel for defendant objects to question as incompetent, irrelevant and immaterial.

A. I have no present recollection of any such person. At the same time, it is possible that I might have met a man of that name. By way of explanation I may say, it is ten or eleven years ago and I have not given it any thought for a long time and it is hard for me to recollect all the details.

Q. State whether or not you recollect to have sold 100 shares of stock represented by these two certificates, Nos. 168 and 169, of the Keystone National Bank of Erie, to W. W. Hand?

Counsel for defendant objects to question as incompetent, irrelevant and immaterial.

A. No, sir, I do not recollect any such transaction. Indeed, I remember only the transaction as shown by the papers which have been submitted to me. Certificates Nos. 168 and 169 were left by me with the Fidelity Trust Company as collateral for certain loans, and in providing for the transfer of this collateral, I signed that paper as I have testified heretofore.

Q. Were you a member of the firm of Delamater & Co.?

A. Yes, sir.

Q. Who were the other members of the firm?

A. At the time of these transactions, George B. Delamater, T. Al- (166)
bert Delamater and George W. Delamater, myself.

Q. What was the business of Delamater & Co.?

A. Receiving deposits, making loans, general banking business.

Q. Where was the business located?

A. Meadville, Crawford County, Pennsylvania.

Q. Are they still doing business?

A. No, sir.

Q. Please state when they ceased business.

A. They ceased business on the morning of December 5th, 1890, when the firm and the members thereof made an asignment to G. W. Haskins and John O. McClintock, for the benefit of their creditors.

Q. That assignment was made under the laws of the State of Pennsylvania?

Counsel for defendant makes an objection, as the deed of assignment should be produced as the best evidence of the transaction.

A. Yes, sir.

Attorney for plaintiff states that either the deed of assignment or a certified copy thereof will be produced.

(167) Q. State whether or not you have any knowledge of the assessment ordered by the Comptroller of the Currency of the United States of 25% upon the capital stock of the Keystone National Bank of Erie, Pennsylvania, made early in 1892?

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial.

A. No, sir, I have no knowledge of any such matter, except as I have incidentally read it in the newspapers.

Q. You did not pay any such assessment?

Counsel for defendant objects to question as leading.

A No, sir. I may modify that answer by saying what my assignees for the benefit of the creditors may have done, I do not know anything about.

Q. As I understand you then, from the time of the assignment for the benefit of the creditors, on December 5th, 1890, you took no action with reference to the 100 shares of stock represented by Certificates Nos. 168 and 169, issued in your name February 4th, 1889, by the Keystone National Bank of Erie, Pennsylvania?

A. No, sir, not to my recollection.

Q. State whether or not you ever authorized the defendant in this action to pay any such assessment upon that stock.

(168) Question objected to by counsel for defendant, as incompetent, irrelevant and immaterial.

A. No, sir, not to my recollection.

Q. State whether or not you knew of, consented to, or ratified in any way, the payment by the defendant in this action of an assessment of 25% upon the 100 shares of stock represented by these two certificates.

Question objected to by counsel for defendant as incompetent, irrelevant and immaterial.

A. I think not. I do not recall any communication passing between us at all concerning this matter.

Q. State whether or not you knew of, consented to, or ratified the payment by the defendant in this action, of $5,750 as an assessment of 25% on 230 shares of the capital stock of the Keystone National Bank of Erie, Pa., which 230 shares included the 100 shares issued in your name, represented by the two certificates Nos. 168 and 169 aforesaid, either personally or as representing Delamater & Co., of which you were a partner, this payment being in satisfaction of an assessment ordered by the Comptroller of the Currency of the United States, on or about March 15th, 1892.

Question objected to as incompetent, immaterial and irrelevant.

A. I think not. I have no recollection of any such consent. (169)

Q. State whether or not either you personally, or as representing Delamater & Co., knew of, consented to, or ratified the act of the defendant in this action, or W. W. Hand, representing the defendant, in voting 230 shares of the capital stock of the Keystone National Bank of Erie, Pa., included in the 230 shares being the 100 shares represented by the two certificates, Nos. 168 and 169 aforesaid, at a meeting of the stockholders of the Keystone National Bank of Erie, Pa., held on or about December 2nd, 1892, for a reduction of its capital stock from $250,000 to $150,000, or from $200,000 to $150,000.

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial, and as assuming facts which have not been proven.

A. No, sir.

Q. Who was the active member of the firm of Delamater & Co.?

A. So far as such transactions as these were concerned, I was.

Q. We show you certificate No. 21, of the capital stock of the Keystone National Bank of Erie, Pa., issued to George B. Delamater, of date March 1st, 1865, and calling for one hundred shares, and a power of attorney attached thereto, bearing date January 29th, 1889. Will you kindly state what you know with reference to these papers?

A. I know nothing about it, except I recognize the signatures which (170)
I know; George B. Delamater, Francis Rawle and T. Albert Delamater.

Q. Across the face of this certificate, No. 21, for 100 shares of the stock of the bank aforesaid, is written, in ink, the words, 'Cancelled by issue of certificate No. 181, January 15th, 1891.' Kindly state what you know in regard to the marking of that certificate in that way.

A. I do not know anything about it.

Q. State whether or not this certificate for 100 shares, No. 21, in the name of George B. Delamater, was a part of the 230 shares of stock placed in the hands of the defendant in this action, by you prior to December 5th, 1890, you at that time representing Delamater & Co.?

Counsel for defendant objects: First, to the form of the question,

and secondly, to the question as incompetent, irrelevant and immaterial.

A. Yes, it was a part of the stock left with the Fidelity Trust Company as collateral for a loan to Delamater & Co., as I recollect, prior to December 5th, 1890.

The certificate and power of attorney are offered in evidence, the certificate being marked for identification, 'Exhibit 4, May 23rd, 1900,
(171) L. E. H.' And the power being marked for identification, 'Exhibit 5, May 23rd, 1900, L. E. H.'

The witness is shown a certificate for 30 shares of the capital stock of the Keystone National Bank of Erie, Pa., dated April 6th, 1871, and No. 57, in the name of George B. Delamater, on the back of which there is an assignment, and apparently executed by George B. Delamater.

Q. Will you kindly state what you know of this certificate?

Counsel for defendant objects to question as incompetant, irrelevant and immaterial.

A. I recognize this as a certificate of stock belonging to George B. Delamater, and which was left with the Fidelity Trust Company with other certificates, as collateral for a loan for Delamater & Co., making up the 230 shares, and were left prior to December 5th, 1890. I recognize the signatures on the back to be those of George B. Delamater, Francis Rawle, George W. Delamater, the witness, and W. S. McGunnegle.

Q. What do you know of the words written on the back of this certificate under the name 'George B. Delamater?'

Counsel for defendant objects to question as incompetant, irrelevant and immaterial.

(172) A. I never saw them until to-day.

Certificate No. 57, just referred to, together with the power on the back is marked for identification, 'Exhibit 6, May 23rd, 1900, L. E. H.'

Certificate No. 57, together with certificates Nos. 168 and 169 and 21, are, with the powers attached or endorsed on the back, and the assignments, offered in evidence by the attorney for plaintiff.

Counsel for defendant objects to the offer as incompetent, and immaterial. And further, that these certificates were assigned or transferred to the defendant. Defendant further objects on the ground that the certificates bear marks and alterations which are unexplained.

Q. Across the face of certificate No. 57, for 30 shares aforesaid, is written in ink, the words 'Cancelled by issue of certificate No. 183, January 15th, 1891.' Kindly state what you know of the marking of this certificate in this way.

A. Nothing. Never saw it until to-day.

Q. I forgot to call your attention to the following words written on

the power attached to certificate No. 21, for the 100 shares in the name of George B. Delamater aforesaid, as follows: 'Signature guaranteed, The Fidelity Insurance, Trust and Safe Deposit Company, Charles (173)
Atherton, Treasurer.' Kindly state what you know of that endorsement on the face of this paper?

Counsel for defendant objects to question as incompetent, irrelevant and immaterial.

A. Nothing. Never saw it until to-day.

Q. You have stated that the only other members of the firm of Delamater & Co. besides yourself, were George B. Delamater and T. Albert Delamater. Kindly state what, if anything, they had to do with the loan made to you upon behalf of Delamater & Co., from the defendant in this action, prior to December 5th, 1890, in which the 230 shares represented by the certificates Nos. 21, 57, 168 and 169, for 230 shares of the capital stock of the Keystone National Bank of Erie, Pa., were placed in the hands of the defendant.

A. Nothing. And as explanatory, I may add that I do not think Mr. T. Albert Delamater knew that there was any such transaction his connection with the firm being nominal. He gave the business no attention. With reference to George B. Delamater, I think he probably knew there was such a loan, because he attached his name to the assignment or power placing the collateral, but outside of that he had nothing whatever to do with the management of the business. It was entirely in my charge.

Q. State whether or not any demand has been made upon you, or (174)
the firm of Delamater & Co., by the defendant in this action, for the payment of any indebtedness for borrowed money of Delamater & Co. to the defendant in this action, since on or about January 14th-17th, 1891.

A. I have no recollection of any demand being made upon me personally, or as representing Delamater & Co., for the payment of this or any other obligation to the defendant at any time, and yet there might have been one made about the time of the maturity of the note. I will say, that after I left Meadville for the far west, where I spent a good many years, which was about the 21st of June, 1891, no demand has ever been made upon me, to my recollection.

Q. You did leave Meadville, going to the west and out of the State, on June 21st, 1891, so that is was impossible to have served you with any demand for payment after that time?

Question objected to by counsel for defendant as leading, irrelevant, immaterial and incompetent.

A. No, sir. I want to be very clear about that. I was back and forth in Pennsylvania. I came back during 1891 and 1892 at least three times. I had to attend to trials in Meadville. The reason why I place that date of June 21st, 1891, was that I have a definite recollec-

tion that since that time no notice or demand was made upon me, but
(175) I certainly had no idea of going where there could not be any demand made. No demand for the payment of the obligation of Delamater & Co. to the defendant, was made after June 21st, 1891. Of this I have a definite recollection.

Q. State whether or not you knew, personally, or as the representative of Delamater & Co., that the defendant in this action, or W. W. Hand, representing the defendant, on or about February 10th, 1893, accepted in lieu of the 230 shares of stock originally represented by the certificates Nos. 21, 57, 168 and 169, a new certificate of reduced stock for 172½ shares, surrendering the old certificates, the new certificates being issued in the name of W. W. Hand, dated February 1st, 1893, and numbered 236.

Counsel for defendant objects to the question as incompetent, irrelevant and immaterial, and as assuming a state of facts which has not been proven.

A. No, I have no knowledge of any such transaction.

Q. State whether or not either you or Delamater & Co. ever authorized, consented to, or ratified any such action of the defendant or W. W. Hand, representing the defendant, in accepting 172½ shares of stock in lieu of 230 shares of stock, as recited in the previous question.

Question objected to as incompetent, irrelevant and immaterial, and as calling for an answer as to matters not necessarily within the personal knowledge of the witness.

(176) A. I think not. At least not to my recollection, as coming through me personally, or as the representative of Delamater & Co.

Cross-examination by Mr. Dickson.

Q. Mr. Delamater, the shares of stock represented by certificates Nos. 21, 57, 168 and 169, I understand you to say were pledged as collateral for a loan made by the defendant to the firm of Delamater & Co. Is that so?

A. I would say to the firm of Delamater & Co. or to some one connected with it. I am not sure that the notes were signed by Delamater & Co. or by me personally, but the loan was to the members of Delamater & Co., or to the firm.

Q. Was that loan paid off at the time of the assignment for the benefit of creditors you have referred to?

A. I think not.

Q. Has it been paid since?

A. I am not sure. Not entirely, I think, and whether there has been any payment made to apply, I am not sure. Possibly the assignees may have made some small payments. I do not know.

Q. You refer to the 21st of June, 1891, as a time since which you

are certain no notice or demand for the payment of the loan has been made upon you. How do you fix that date with such certainty?

A. It was a time at which I may say I changed the whole course of (177)
my life, leaving my birthplace and old home and going to the far west. I cannot explain why it should be definite in my recollection, but it has remained there very clearly ever since.

Q. You refer to certain trials. Were you yourself a defendant or only a witness?

A. I was defendant.

Q. Are those the proceedings whereof the report is to be found in the second volume of the Pennsylvania District Reports for 1893?

A. I am not sure. I am not familiar with that report. I can tell if I look.

Plaintiff being shown Pa. Dist. Rep., at pages 118 and 562, answers yes.

Counsel for plaintiff objects to question as immaterial, irrelevant and incompetent.

Q. I ask you whether you have any recollection of the letter reading as follows:

'Philadelphia, December 17th, 1890.

Messrs. Delamater & Co., or their Assignees,

Meadville, Pa.

Gentlemen: We hold a note of Delamater & Co., dated November 15th, 1890, due in sixty days, secured by 230 shares of Keystone Na- (178)
tional Bank of Erie, and have to notify you that the same cannot be renewed. If you are prepared to anticipate the payment and have the collateral returned, we will be glad to arrange it. The note bears interest at 6% from date.

Yours respectfully,

R. PATTERSON, V. P.'

And you are further asked if you know who R. Patterson was and what official capacity, if any, he held in any company.

A. I have no recollection of that letter. It, I am satisfied, must have come, or probably did come, to my attention. If it was sent, as it seemingly was, to Delamater & Co., the attention of my assignees in Meadville at that time, would be called to it. It was with that idea in mind, that probably some such notice was given to me about the time of the maturity of the note, that I carefully qualified my answer to the question of Mr. Waters, given before. As to Mr. Patterson, I must confess that at the present time I have no recollection of him and only know of his capacity by the quotation of the letter. Evidently, he was Vice-President of Fidelity Trust Company.

Q. Have you any recollection of a letter reading as follows?

'May 5th, 1891.

Messrs. Delamater & Co.,

Meadville, Pa.

(179) Gentlemen: I have to renew the call heretofore made on you for payment of your note for $15,000, dated November 15, 1890, due at sixty days. The time expired January 17th last. The note carries 6% from its date. It is secured by 230 shares of the Keystone National Bank of Erie, and if we cannot secure prompt payment for the note and interest, I have to notify you that we shall proceed to sell the collateral at auction.

Yours respectfully,

R. PATTERSON, Vice Pres.'

I will also ask if you have any recollection of another letter reading as follows:

'Philadelphia, May 5th, 1891.

Assignees of Delamater & Co.,

Meadville, Penna.

Gentlemen: I enclose herewith a copy of a note addressed this day to Delamater & Co. As the business concerns you as their Assignee, we trust you will be able to settle the note and avoid the necessity of selling the collateral.

Yours respectfully,

R. PATTERSON, Vice Pres.'

A. I have no present recollection of those letters, and yet think it is very probable that I may have seen them both. That it may be fully understood, however, how I possibly may never have seen them, and only had them brought to my attention by my Assignees, I might say
(180) that during that period, indeed, all along after the assignment of Delamater & Co., all mail that came to Delamater & Co. went to the assignees. I never presumed to open it, and still I am not disclaiming the possibility or probability of having seen those letters.

Q. Were you not, after the time of your assignment, whenever you were in Meadville, in consultation with your assignees and assisting in straightening out the affairs of Delamater & Co.?

A. Yes, sir, quite frequently in consultation with them. Most of my time, however, was devoted at that period, in trying to bring about a settlement with my creditors, so that my time was more devoted to the creditors than to the assignees.

Counsel for defendant states that it will be shown hereafter that R. Patterson was, at the time of the date of these letters, the Vice President of the Defendant Company.

Q. Mr. Delamater, assuming that these letters were sent in due course, at the various dates mentioned, in whose custody would the letters properly be now.

A. The assignees' custody.

Q. Who are they?

A. George W. Haskins and J. O. McClintock were. I understand they have been discharged. Don't know certainly about that.

Q. Have those papers been delivered to any member of your late (181) firm, so far as you have knowledge?

A. No, sir.

Q. Have you at any time made demand upon the Fidelity Insurance Trust & Safe Deposit Co. for the return of the stock of the Keystone National Bank of Erie, pledged with the Fidelity Company as collateral, and made tender of paymet of the loan?

A. No, sir.

(Signed) GEORGE W. DELAMATER."

Also deposition of T. Albert Delamater, as follows:

"T. Albert Delamater, a witness produced on behalf of the plaintiff, being first duly sworn, deposes and says as follows:

Direct Examination by Mr. Waters.

Q. You have stated your name is T. Albert Delamater. Kindly state where you reside?

A. At the present time, in Pittsburgh.

Q. How long have you resided here?

A. About one year.

Q. Were you a member of the firm of Delamater & Co.?

A. Yes, sir.

Q. Do you remember when that firm made an assignment for the (182) benefit of its creditors?

A. I cannot give the correct date.

Q. Was it December 5th, 1890?

A. I think it was.

Q. The business of Delamater & Co. was that of banking, I believe?

A. Yes, sir.

Q. At Meadville, Pa.?

A. Yes, sir.

Q. Who were the Assignees?

A. Haskins and McClintock, of Meadville.

Q. Who were the partners of the firm?

A. My father, G. B. Delamater, G. W. Delamater, and T. Albert Delamater, myself.

Q. Did you take an active part in the management of the firm?

A. No, sir.

Q. Who was the active man in the firm?

A. My brother, G. W. Delamater.

Q. Have you any knowledge of a transaction with the defendant in this action, the Fidelity Insurance, Trust & Safe Deposit Company, of Phila., prior to December 5th, 1890, by which Delamater & Co. borrowed the sum of $15,000?

(183) A. No, sir, I have no knowledge of it. I actually knew nothing of the affairs of the bank. I was scarcely ever inside of it.

Q. Then you know nothing in regard to certain certificates of stock issued by the Keystone National Bank of Erie, Pa., certificates Nos. 21, 57, 168 and 169, for 230 shares, which were placed in the hands of the defendant in this action prior to December 5th, 1890, by Delamater & Co.?

A. No, sir, I have no knowledge of it.

Q. Has the Fidelity Insurance, Trust and Safe Deposit Co., at any time, made demand upon you personally, or upon Delamater & Co. so far as you know, for the payment of a note for $15,000, dated November 15th, 1890?

A. No, sir.

Q. As a member of the firm of Delamater & Co., did you ever consent to or ratify the acts of the defendant, or of W. W. Hand, representing the defendant, in voting for a reduction of the capital stock of the Keystone National Bank of Erie, and accepting 172½ shares of the capital stock reduced, of the bank, in lieu of 230 shares, or the paying of an assessment of 25%, in 1892, amounting to $5,750, which assessment had been ordered by the Comptroller of the Currency of the United States?

(184) Question objected to by counsel for defendant, as incompetent, immaterial and irrelevant.

A. No, sir.

Q. Have you ever had any connection whatever with the defendant in this action, or W. W. Hand?

A. No, sir.

Cross-Examination by Mr. Dickson.

Q. Did you have any knowledge of the proposed acceptance of the proposition to reduce the capital stock of the Keystone National Bank of Erie, as referred to by counsel for the plaintiff?

A. No, sir.

Q. Did you have any knowledge of a levy of an assessment upon the capital stock of the Keystone National Bank of Erie, as referred to by counsel for the plaintiff?

A. No, sir, I had not. I would say that I know nothing about the affair at all. I never knew of the transaction you speak of.

Q. Was this transaction, then, on the same basis as all other transactions of the firm of Delamater & Co., so far as you are concerned?

A. So far as I was concerned, yes, sir.

Q. By that you mean that you knew nothing about it?

A. I knew nothing about it whatever.

Q. And in like manner you knew nothing about the other affairs (185) of the concern?

A. No, sir.

Q. What was your business prior to the assignment of your firm for the benefit of its creditors?

A. I was General Superintendent and Auditor of the Meadville & Linesville Railway Co.

Q. Did your duties in that capacity occupy all your time and attention?

A. In that and what other outside matters I had.

Q. Did you have any connection with the straightening out of the affairs of Delamater & Co. after the assignment?

A. No, sir, I did not.

Q. Did you have any knowledge of certain letters written by the Fidelity Insurance, Trust and Safe Deposit Co., under dates of December 17th, 1890, and May 5th, 1891, and signed by R. Patterson, the Vice President of the Fidelity Insurance, Trust and Safe Deposit Co.?

A. No, sir.

Q. And was that, for the same reason, namely, that you had no connection with the affairs of the firm of Delamater & Co.?

A. It was.

Q. Who was the senior partner of the firm?

A. I do not know who would be called that. Perhaps my brother, (186) Geo. W. Delamater. He was the active member.

Q. Is he older than you?

A. He is about two years older.

(Signed) T. ALBERT DELAMATER."

PLAINTIFF CLOSES.

Mr. Dale: I move for a non suit.

The Court: I am entirely clear that there are questions of fact which must go to the jury, and the motion for non suit is overruled.

Court adjourned until Wednesday, October 17, 1900, 10 A. M.

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(187) Wednesday, October 17th, 1900, 10 A. M.

DEFENDANT'S EVIDENCE.

HARRY J. MOORE, Affirmed.

By Mr. Dale:

Q. What is your business?

A. Clerk for the Fidelity Trust Company, loan department.

Q. How long have you been there?

A. Thirteen years, since the 1st of June, 1887.

Q. (Witness shown envelope marked "Time bill" No. 32,057.) Whose handwriting is on that envelope on the outside?

A. Mine. That is my writing, my entry.

Q. When did you make the first entry which appears there with the name of the party?

A. November 15, 1890.

Q. Please read those entries.

A. "Delamater & Company, November 15, 1890, at sixty days. Due January 17, 1891."

Q. That is in your handwriting?

A. Yes.

Q. What is stated to be the collateral?

A. "230 shares National Bank of Erie, Pa.," Keystone National Bank.

Q. Under what circumstances did you make those endorsements on that envelope?

(188) A. The entries here on the envelope are not in my handwriting. (Indicating.)

Q. The entries you have just identified—under what circumstances did you make the entries which you have just identified and read?

A. This was a loan made to Delamater & Company?

Mr. Johnson: You do not know that? Mr. Dale asks you under what circumstances.

Q. Under what circumstances did you make those entries?

A. Why it was done?

Q. What do you know about it?

By Mr. Johnson:

Q. Did you see the Delamaters or any of them?

A. No, sir, I did not.

By Mr. Dale:

Q. What did you see and what did you put in the envelope at that time?

A. I saw the note.

Q. Where is the note now?

A. This is the note here.

Q. Where has that note been since November 15th, 1890?

A. It has been in the vault of the Fidelity Trust Company, in the loan department.

Q. In what envelope?

A. In this envelope.

Q. What else besides the note?

A. Certificates for 230 shares of the Keystone National Bank of (189) Erie, Pa.

Q. In whose handwriting are the other entries on that envelope?

A. The first one is in the writing of Mr. Hand—this one. (Indicating.)

Mr. Johnson: I object to that envelope, and to the witness being asked any question about the envelope, saving that he may say what was put on that envelope when the thing was put away with it. Beyond that I object.

Q. Under the item of $15,000, are what words?

A. "Assessment paid September 16th, 1892, $5,750.

Q. Carried out with what figures?

A. "4-23-93, $7,950."

Q. But before that—it is footed up, $15,000, $5,750, making $20,750, and 4-23-93, $7,950, and carried down $19,954.40?

A. Yes.

Q. It is $795.60?

A. Yes.

Q. What did that item of 4-23-93, of $795.60 refer to?

A. A dividend from the assigned estate.

Q. So far as you have any knowledge please state whether the shares which were represented by the certificates kept in this envelope were ever offered for sale?

A. I cannot say that I know.

Q. That is not within your knowledge?

A. No, sir.

(190) Q. What books did the Fidelity Company keep with reference to this loan?

A. We had it entered in the time loan book and the ledger.

Q. What books were kept with reference to this loan?

A. The time loan book and ledger.

Q. Which was the book in which the entry was first made?

A. In the time loan book.

Q. In whose handwriting is the entry originally made?

A. My handwriting.

Q. Was it made at or about the time of November 15, 1890?

A. Yes, sir.

Mr. Johnson: I do not object to that entry so far as it states what they put in at the time, but there are some subsequent and long-after statements made which I will object to.

Mr. Dale: I offer these books on the issue, which I understand is the issue of fact in this case, whether or not the Fidelity Company had become the absolute owners of these shares as against Delamater & Company, and I propose to show by these books that until the failure of the Keystone Bank the books were kept showing that it was a time, loan, that the debt still existed, the collateral was still on hand as collateral; they were, therefore, on that issue, books kept by the Fidelity which contained a declaration against their interest, and being kept in that way they are competent evidence, when this issue arises to show that in fact until after the failure of the bank the Fidelity
(181) continued to hold these shares as collateral, because they have so kept their books that Delamater & Company, if the stock became valuable at any time, would have had a right to say to the Fidelity Company, "This stock is ours, held by you in pledge, and upon payment of the debt we are entitled to a return of the stock," the books so kept evidencing that fact being competent evidence against the Fidelity Company, against itself, on this issue are competent as a declaration against interest.

Mr. Johnson: I object to the books as proving anything of the sort. The bank cannot keep books in which they keep their history of the transaction, and at some later time offer the books in evidence against persons not privy to these entries, they cannot control them not having access to them.

The Court: I understand, Mr. Johnson, that you do not object to the entry made at the time of the transaction?

Mr. Johnson: I am willing to admit the books to show when the loan was made they put certain entries there, but after that I object.

The Court: There is no dispute that this was a time loan and that these shares were put up as collateral—that is, the original transaction.

Mr. Johnson: I will admit that, but there I stop.

Mr. Dale: I offer the time loan book, in connection with the ledger account, which is before the witness, as to the identification of which I do not understand any technical question is raised—the time loan book in connection with the ledger kept by the Fidelity Company, containing a reference to this loan, for the purpose of showing that until (192)
after the failure of the bank, and until the year 1898, when this loan was charged off to suspense account, the books of the Fidelity Company show that they held the loan, with these shares as collateral; that that is a declaration in writing against the interest of the Fidelity Company as between themselves and the Delamaters, which would have been competent evidence against the Fidelity Company if the Delamaters had asserted ownership of the shares; therefore it is competent evidence to show in this cause that in fact the ownership of the Fidelity Company, until after the failure of this bank, continued to be that of pledgee.

Mr. Johnson: I object to the books because no books which they kept giving their history of the transaction can be competent evidence against us.

The Court: I will defer the ruling on this proposition.

(Offer withdrawn for the present.)

(Witness withdrawn.)

JOHN B. GEST, Affirmed.

By Mr. Dale:

Q. What office do you hold in the Fidelity Company?

A. President.

Q. Since when have you been President?

A. Since November, 1890.

Q. Prior to being President, what office did you hold?

A. Vice-President from 1873. (193)

Q. Please state to the Court and Jury your knowledge of this loan of Delamater & Company, what if anything the Fidelity Company did with reference to that collateral?

A. I think the loan was made perhaps in November, 1890. I think it was made—you may correct me by the papers if I am wrong—for thirty days.

By Mr. Johnson:

Q. Did you have any knowledge of the loan? Did it come under your personal knowledge at the time at all?

A. Not directly.

By Mr. Dale:

Q. The paper which I show you is the note which represented the indebtedness?

A. Yes. This is a note of Delamater & Company for $15,000, at sixty days, dated November 15, 1890.

Q. What did the Fidelity Company do or cause to be done with reference to the shares representing the bank stock?

A. We held the certificate for the shares of stock with the note as collateral for it. There was an assessment made upon the stock. That assessment we paid. I have not the dates. An assessment was made upon the stock, though I do not now remember exactly the amount. That assessment we paid, and charged up the assessment with the amount of the loan.

Mr. Johnson: Do not tell us what it was charged up to.

Q. You charged it as appears on the books?

A. Yes, sir.

(194) Mr. Johnson: I ask that to be stricken out, because it is getting it at second hand. He says it was charged on the books. I would object if it was charged on the books, and still more to the statement that it is charged.

The Court: This is simply proving that the books contain an item which is for the further consideration by the Court. He does not even say what the item is.

Q. After paying that assessment what, if anything, did the Fidelity do with reference to selling the shares?

A. Inquiries were made to know whether the shares could be sold, but we never got any offer for the stock and never sold it.

Q. And they never were sold?

A. They never were sold. They still remain as a credit upon the loan of Messrs. Delamater & Company.

Q. Please state whether or not any act was ever done by the Fidelity Company, after the failure of Delamater & Company, to change the legal relations between Delamater & Company and the Fidelity Company as debtor and creditor?

Mr. Johnson: That I object to, because the witness cannot tell whether an act was done to change the legal relations; secondly, because the witness has not testified he knows whether the acts were done by anybody else. He cannot testify to

that. He can only testify to what he did or directed. He cannot tell what was done by other officers. I object to it first because it is asking him to testify to a matter of law; and secondly, because it is asking him to testify not concerning matters within his own knowledge but matters within the knowledge of others as well as himself. (195)

The Court: The form of the question is objectionable.

Q. Please state whether or not after the failure of Delamater & Company any act was done by the Fidelity Company with reference to these shares other than the payment of the assessment to which you have referred?

Mr. Johnson: That I object to for the second reason.

The Court: Of course the witness is understood to answer of his own knowledge, and considering that as inserted in the question the question thus amended I see no objection to. The witness is instructed to speak simply of his own knowledge, whether as far as he knows any act was done.

Q. Of course in answering this question you are to speak only of acts within your knowledge, and from such investigation you may make as chief of the company.

Mr. Johnson: I object.

The Court: That is, only within your own knowledge?

A. I cannot say that I can answer that question of my own knowledge. I can state what our books show, and I can state what we did with the collateral and with the note. Our books will show that. Of course it is for the Court to say how far I can answer the question, but I know it perfectly well from the books.

Q. The question I asked you was whether you knew of any act having been done to change the relationship of the Fidelity Company to these shares after the failure of Delamater & Company? (196)

A. I know of no act whatever done by the Fidelity Company to change the relationship between the parties.

Cross-Examined.

By Mr. Johnson:

Q. We all know that you are the president of a very large company, having a great many different branches of business. You are a Trust Company and Banking House, and have very multiform duties.

A. Yes.

Q. And of course you do not attend to the details of every transaction? A man could not, and you do not? That is so?

A. It is so, to this extent—

Q. This matter is not a matter which in the course of business would come under your direct supervision and management?

A. It is true that I do not look at or know of all the details that are transacted in the office but I like to know about them and hear of them, and I have been conversant with this Delamater matter ever since the failure of that firm.

Q. Were you cognizant of the letters Mr. Atherton wrote?

A. No.

Q. Then that was done without your knowledge at the time?

(197) A. Yes.

Q. Then I suppose by cognizant you mean some of them you knew at the time and some you learned after the time? Is not that so?

A. That may be, but I knew about the Delamater loan at the time it was made.

Q. That is, you knew generally there had been a loan made?

A. Yes, sir.

Q. Did you make the loan or did Mr. Atherton make it? I mean did you directly take charge of it?

A. It was in the immediate charge of Mr. Atherton. How much Mr. Caldwell the former president who died in November 1890—I think he directed the matter in the first place, but he died very soon after, and Mr. Atherton as treasurer of the company then, I think, had immediate charge of this loan.

Q. When first were you asked personally to direct anything concerning the matter? I do not ask what you directed, but when first in this matter did you personally direct the doing of anything?

A. I cannot answer.

Q. Of course you did not direct these entries to be made in the book? Whatever entries were made in the book were made by the proper clerks and officers having charge of the books.

A. That is so.

Q. When the question of paying the assessment came up do you remember whether you were consulted about that?

(198) A. I cannot recollect. I may have been.

Q. When the question of reducing the stock came up do you recall that you personally had anything to do with that—reducing the number of shares?

A. No, sir, I cannot say that I knew anything about that.

Q. When the question came up of putting the stock in the name of Hand were you personally consulted about that?

A. I think not. I do not recall that I was.

Q. When the question came up of giving the proxies to vote for the election of directors were you consulted about that, or did that go through Mr. Atherton or some other officer?

A. I do not know that we ever did give any proxies.

Joseph B. Richardson, sworn.

By Mr. Dale:

Q. What is your occupation?

A. I am assistant treasurer of the Fidelity Trust Company.

Q. How long have you held that office?

A. Since 1893.

Q. Prior to 1893 and back of 1890 what was your occupation?

A. Auditor for the Company.

Q. In connection with what department of the Company did you have your location?

A. My desk during my position as auditor was in the loan room, the loan department.

Q. When did your knowledge of the Delamater matter begin?

A. I may say from the commencement of the dealings with Dela- (199)
mater.

Q. What knowledge had you of this envelope and its contents from 1890 down to the present time?

A. I know that envelope was placed in the vault of the Fidelity Trust Company, in the closet containing the collateral loans, with the note and the collateral; and as auditor it came under my inspection and examination repeatedly.

Q. And where has it been held from November, 1890, until the present time?

A. In that same envelope, in that same vault.

Q. Where are the securities kept by the Fidelity Company which they owned as distinguished from those which they hold as collateral?

A. They are kept in the same vault but in an entirely separate closet. One is labeled investments and the other is loans and collaterals, entirely separate.

Q. And where, did I understand you to say, that envelope and contents were kept?

A. This envelope was in the loan closet, among the loans.

Q. Where is Mr. Atherton now?

A. He is at his home sick.

Mr. Johnson: I admit Mr. Atherton is not able to be called as a witness, and therefore no inference is to be drawn from not calling him.

(200) Cross-examined.

By Mr. Johnson:

Q. You do not mean to say that envelope, and the contents now in it, have been in there since 1890?

A. Yes, sir.

Q. Without change?

A. Since 1890?

Q. Yes.

A. The only thing taken out was to make these entries on them and they were replaced.

Q. And the contents never removed except for that purpose?

A. The contents was removed at the time the stock was sent to the Erie Bank for reduction, of course. Those things go without saying.

Q. Who took the shares out for that purpose? Not yourself?

A. No.

Q. You did not have the charge of taking them out?

A. I had not.

Q. The proper officer of the Company would take those shares out without asking you about it?

A. Certainly.

Q. Or anything of that sort?

A. Yes.

Q. And therefore that envelope was not under your charge in the sense that the proper officer of the company at any time he wanted to
(201) could not go in the course of his business and take them out and put them back?

A. Yes, it would come under my inspection again as auditor.

Q. That is, at a certain time you would look, and at that time you would find certain things in it? That is all your inspection amounted to?

A. I have to compare that with the book and see that they correspond with the book.

Q. At certain times you open the envelopes and look what is in them?

A. Yes.

Q. Excepting at these times you do not know what is being done with the securities?

A. I did know. Although I was the auditor I was also assistant in the loan department, and assisted almost every day in making loans. When Mr. Atherton was away I was deputized to take charge of the loan department, and knew everything that was going on.

Q. Mr. Atherton had charge of this matter, and acted for the Company in the matter, did he not?

A. Yes, sir.

Mr. Dale: I now offer in evidence a letter headed "Keystone National Bank, Erie, Pa." and dated April 7th, 1894, as follows:

"Charles Atherton,
Vice President, Philadelphia, Pa.

Your favor of March 20th and April 4th addressed to Matthew (202)
Griswald, president, were delivered to Mr. Giswald's home, and on account of the absence from the city of Mr. Griswald and family were duly delivered at the bank this morning. Hence reason for delay in replying. The general upsetting of banking business the past year has been rather discouraging in profit earnings, which we regret to say were not large, owing principally to large withdrawals of deposits which of course contracted our loaning power. There has been no change of stock since last May. A small block which brought par. I enclose copy of last statement.

Respectfully,
J. W. KEPLER."

Attached to that letter is the statement referred to therein.

I also offer letter headed "Keystone National Bank, Erie, Pa.," dated "Erie, Pa., April 14th, 1897, as follows:

"Charles Atherton, Esq., V. P.,
Phila., Pa.

Enclosed find report of this bank March 9th, 1897. As regards sale of the stock, I think there would be a poor chance at the present time. Since our trouble of several years ago we have made no dividends, the condition of business being such that is has not been advisable to do so. Business is picking up in this locality. Should it continue we will get our share of it and be able to make dividends. Now then will be a chance for a sale of stock. I will keep this matter in mind and should (203)
I find a chance for a sale will let you know. I have been out of the City, thus the delay in answering yours of the 8th.

Respectfully yours,
T. W. LAMB, Cashier."

Mr. Dale: I call for letters of March 20th and April 4th. The letter of March 20th has already been put in, but I call particularly for the letter of April 4th.

(Letter not produced, and it was agreed to use the letter press copy.)

The letter of April 4th, 1894, is as follows:

"Mr. Matthew Griswald,
Pres. Keystone National Bank, Erie, Pa.

Dear Sir: You will please answer my letter of March 20th asking for information in regard to the business of your bank. We would like you to send us a copy of your last statement published, also would like to know if there has been any sales of stock within the last six months, or what price was the last sold at. As we have a loan of $22,000 depending on the value of 172½ shares we desire the above information. Very truly yours,

CHARLES ATHERTON,
Vice President."

Also letter of April 8th, 1897, as follows:

(204) "F. M. Lamb, Esq.,
Cashier Keystone National Bank, Erie, Pa.

Dear Sir: March 17th I addressed a note to Mr. F. V. Kepler supposing he was still cashier of your bank. He said he was not connected with the bank and referred me to you. On March 20th I wrote you this company owns 172½ shares of the stock of your bank registered in the name of W. W. Hand. Since we have held the stock we paid an assessment and the number of shares reduced. We have no knowledge of the bank affairs. We would like to have a copy of the last statement to the Comptroller and any other information in regard to the business of the bank you will give us. Are there any market for the stock and at what price? We are anxious to sell this stock to close an account. If you can put us in the way of selling the stock we will pay a commission. Yours truly,

CHARLES ATHERTON, V. P."

Also letter of March 20th, 1897, as follows:

"T. M. Lamb, Esq.,
Cashier Keystone National Bank, Erie, Pa.

Dear Sir: This Company owns 172½ shares of the stock of your
(205) bank registered in the name of W. W. Hand. We would be much obliged for any information you can give us in regard to the business of the bank or a copy of the last statement to the Comptroller. Has there been any sales of the stock within the last year, if so at what price. We wish to close the account for which this is collateral. If you can put us in the way of finding a customer we will pay you the usual commission.

Yours truly,
CHARLES ATHERTON, V. P."

I also offer the assessment notices received from the Receiver of the plaintiff bank, showing that the assessment was made in duplicate, apparently, on these shares—one assessment being addressed to the defendant, and the other to Mr. Hand; both being upon printed blanks, the one to Hand referring to it as an assessment on 172½ shares of stock "Standing in your name," and the other referring to shares of stock "owned by you."

I now desire to renew my offer of the time loan book and the ledger account, for the purposes heretofore stated.

Mr. Johnson: I object, for the reasons heretofore given.

The Court: When did the Keystone Bank close its doors?

Mr. Waters: June 29th, 1897.

The Court: All the information contained in these entries has been already testified to and is already in the possession of the court, with a single exception of the entry under date of January 31, 1898. As this entry was made after the insolvency of the bank, it seems to me that at (206)
that time it was an entry not against interest, but an entry in support of interest, and therefore it is rejected.

(Exception noted for defendant.)

Mr. Dale: I offer so much of the book as relates to everything except the entry of January, 1898, for the purpose of showing that at the date of the closing of the bank in June, 1897, the Fidelity Company charged itself with these shares as shares held in pledge.

Mr. Johnson: I object, because the book merely shows that no entries were made, excepting one which has been ruled out, after a certain date; and because even if it did show entries made in it would be incompetent proof against the plaintiff.

The Court: It is not disputed that when this loan was made it was a loan upon collaterals. The books show that. It is not disputed that you paid the assessment on the stock. The books show that. It is not disputed you got $795 dividends. The books show that. What more do you want to show?

Mr. Dale: The books show the account thus remained an open account as between the Fidelity Company and the Delamaters, whereby they treated him as their debtor, and they accepted the position of creditor, holding the shares as collateral for that debt.

The Court: I cannot admit the entries and the objection is sus- (207)
tained.

(Exception noted for defendant.)

Copy of Exhibit A of May 24, 1900, attached to the depositions of Messrs. Haskins and McClintock:

ASSIGNMENT FOR BENEFIT OF CREDITORS. DELAMATER & CO. TO GEO. W. HASKINS AND JOHN O. McCLINTOCK. Recorded Dec. 5, 1890.

This Indenture Made the Fifth day of December, in the year of our Lord one thousand eight hundred and ninety, between G. B. Delamater, G. W. Delamater, and T. A. Delamater, partners in the Banking business as Delamater & Company of Meadville, Pa., of the first part and George W. Haskins and John O. McClintock of the second part.

Whereas, the said firm of Delamater & Co., Bankers, owing to sundry losses and misfortunes, are at present unable to discharge their just debts, and are willing to assign all their property for the benefit of their creditors.

Now this Indenture Witnesseth, That the said Delamater & Co., as well in consideration of the premises, and for the purpose of making a just distribution of their estate and effects among their creditors, as
(208) also the sum of One Dollar, to them in hand paid by the said Geo. W. Haskins and John O. McClintock the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said Geo. W. Haskins and John O. McClintock their heirs and assigns, All the estate, real, personal and mixed of the said Delamater & Company of whatsoever kind and wheresoever situate, together with all accounts, notes, bills, choses in action due to and owned by the said Delamater & Company. And also all the goods, chattels and effects, and property of every kind, real, personal and mixed, of the said Delamater & Company.

To Have and to Hold receive and take the same to the said Geo. W. Haskins and John O. McClintock, their heirs and assigns, forever; in trust, however, and to the intent and purpose that they, the said Geo. W. Haskins and John O. McClintock shall and do, as soon as convenient, sell and dispose of all the lands, tenements, goods and chattels of them the said Delamater & Company and collect and recover all the outstanding claims and debts to them, the said Delamater & Company due, and with the moneys arising therefrom, after deducting his the said Geo. W. Haskins and John O. McClintock's reasonable cost and charges, shall and do pay the creditors of the said Delamater & Com-
(209) pany their respective just demands in full, if there shall be sufficient assets to satisfy the whole; and if there shall not be sufficient assets to satisfy all the just demands of the Creditors in full, then pro rata according to the amount of their respective demands, without preference as between individuals. And should any part or portion of said trust

property or funds remain, after fully complying with the trusts aforesaid, then the said Geo. W. Haskins and John O. McClintock shall deliver over and reconvey the same to the said Delamater & Company, their heirs, executors, administrators or assigns.

In Witness Whereof, the said party of the first part to these presents have hereunto set their hands and seals the day and year first above written.

DELAMATER & CO. (L.S.)
By G. W. Delamater.

Sealed and Delivered in presence of
H. M. Dickson.

STATE OF PENNSYLVANIA, } ss.
COUNTY OF CRAWFORD. }

Be it Remembered, that on this Fifth day of December in the year one thousand eight hundred and ninety, before me, a Recorder of Deeds in and for said County, personally appeared G. W. Delamater, of the firm of Delamater & Company, who, I am satisfied, one of the individuals named in, and who executed the above Deed or Conveyance, and I having first made known to him the contents thereof and (210)
acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of the said firm. Witness my hand and seal.

(Official Seal.) H. M. DICKSON,
Recorder."

STATE OF PENNSYLVANIA, } ss.
CRAWFORD COUNTY. }

I, L. L. Shattuck, Recorder of Deeds, &c., in and for said County and State, do hereby certify that the above and foregoing is a true and correct Copy of Deed of Assignment from Delamater & Co. to Geo. W. Haskins and John O. McClintock, as appears of record Dec. 5, 1890, in Deed Book B. No. 6, page 83.

Witness my hand and Seal of Office, May 24, 1900.

L. L. SHATTUCK,
Recorder."

Copy of certificate of stock sued on called for by plaintiff and pro- (211)
duced by defendant.

No. 236. THIS CERTIFIES THAT 172½ Shares

W. W. Hand is the Owner of One hundred seventy-two ½ full paid shares of One Hundred Dollars each in the Capital Stock of

THE KEYSTONE NATIONAL BANK OF ERIE, PA.

transferable only on the Books of the Corporation in person of by Attorney and on the surrender of this Certificate.

IN WITNESS WHEREOF the Seal of the Corporation and the signatures of the President and Cashier are hereunto affixed, Erie, Pa., February 1st, 1893.

THE KEYSTONE NATIONAL BANK OF ERIE, PA.

F. V. KEPLER, Cashier. MATTHEW GRISWALD, President.

Copy of the endorsement on the back of said certificate:

FOR VALUE RECEIVED.....hereby sell, transfer and assign to .....
the shares of Stock within mentioned, and authorize.....
.....to make the necessary transfer on the books of the Bank.

WITNESS my hand and seal this 10th day of February, 1893.

Witnessed by: W. W. HAND. (L. S.)
HARRY J. MOORE.

Defendant Rests.

Testimony Closed.

Recess until 2 o'clock P. M.

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(212) IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

HAYES, Receiver,

vs.

FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

April Term, 1899. No. 6.

Philadelphia, Pa., October 18, 1900.

CHARGE OF THE COURT.

Hon. JOHN B. MCPHERSON, *J.*

Gentlemen of the Jury: This question which is to be submitted for your determination is not so much a question of what the facts are, as what is the proper inference which should be drawn from the facts; for, as you have no doubt noticed, there is, I think I may safely say, no serious dispute about the things that were done by the parties to this transaction. The dispute is, what inference you ought to draw from these facts that have been proved. And, stated in another way, the question is whether before this Keystone National Bank failed the defendant company—the Fidelity Trust Company, of this city—was the real owner of these shares of stock, or whether it continued to be the pledgee of the stock; whether the stock had become theirs in the sense in which we use in ordinary speech the word owner, or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence.

The suit is one that is brought by the Receiver of the Keystone (218)
National Bank of Erie, and is brought to enforce what is known as the stockholders' liability. You know, of course, that under the Act of Congress when a national bank fails, those who are stockholders of the bank at that time—at the time when the bank is closed by the Comptroller of the Currency—are liable to an additional sum equal to the par value of the shares then held. And it may become in a given case very important to determine who is the real owner of certain shares. It does become thus important in this case and that dispute is the one which you are called upon to determine.

I think it will be superfluous for me to take up your time, and my own, by any discussion of the evidence in this case. I do not pretend to go over it piece by piece, for you have just heard a very capable discussion upon both sides of the evidence, and you have been urged by each counsel to draw the inference which he thinks should be drawn from the facts. I shall therefore content myself with simply pointing out to you what I think is the real question in the case, and then leaving it for you to determine. The facts are entirely for your determination; the degree of credit to be given to witnesses, and the inferences that should be fairly drawn from the facts proved. The whole sub- (214)
ject, as I regard it—for the present at least—is a question of fact; and that question, I repeat, is whether the defendant company—the Fidelity Trust Company—was at the time when this bank went into the hands of the Receiver the real owner of these shares of stock, or whether it continued to hold them as collateral security for the pay-

ment of the note originally given by the Delamaters. With regard to the original transaction there is no dispute. Both parties are agreed that in the beginning this was an ordinary collateral loan. The Delamaters borrowed $15,000 from the Fidelity Trust Company, and pledged at that time the 230 shares of stock of the Keystone National Bank, signing upon the back of the certificates blank powers of attorney to transfer the stock, and delivering the certificates to the company. The stock remained in that condition—the transaction remained in that situation—until the insolvency of the Delamaters, which occurred shortly afterwards; and after they made an assignment for the benefit of creditors—within a short time thereafter, I think within a month—this stock was transferred on the books of the bank to a clerk of the defendant company, Mr. Hand. His name was, by direction of the company, written in the blank powers of transfer on
(215) the Delamater certificates, they were delivered to the company, these original certificates were surrendered by the company to the bank, new certificates were issued in Hand's name, he signed his name in blank on these certificates, and they were delivered to the company. Afterwards when the stock was reduced, a certificate was issued to him for a smaller number of shares, he also signed the blank power of attorney on the back, and the same course was taken with that certificate. The original transaction, as I have said, is conceded to have been an ordinary collateral loan. The question for you to determine is, did that transaction change its character—was there a change in the situation thereafter? Did the company become the real owner of this stock? Did the Trust Company at any time before the failure of the bank regard itself as the real owner, and thereafter deal with that stock in that character?

There is no evidence, and indeed it is conceded, that they never at any time exercised the power to sell given by the collateral note, so that the title of the Delamaters was not extinguished in that way. The averment is, that in some way the Trust Company became the owner of this stock, by taking possession of it and by dealing with it as the owner, and regarding themselves as the true owner of the stock. Now the evidence upon that subject is conflicting. There are several
(216) pieces of evidence that may permit either inference to be fairly drawn and the jury must decide which one should be drawn. For example—and I am only using this as an illustration, not as stating all the evidence upon the subject by any means—the payment of the assessment upon this stock which was ordered by the Comptroller of the Currency in the year 1892—from that evidence the jury might draw either inference fairly, as it seems to me. They might either draw the inference that the Trust Company, regarding itself as the real owner of the stock, was paying the assessment because as owner it regarded itself as liable to make that payment; or, as they knew at

that time that the Delamaters were insolvent and in the hands of assignees for the benefit of creditors, and that they certainly could not, and were not able to, respond to an assessment, the inference might also be drawn that the Trust Company, in order to protect their collateral, felt bound to make this further advance and take the chance of something coming out of the stock thereafter. Which inference should be d[illegible]wn from the fact of the payment of the assessment, is for the jury to determine. And so with regard to the giving of proxies by Mr. Hand. He was the registered owner of the stock upon the books, and, I take it, no one could have voted upon that stock but himself. Being the registered owner, it might perhaps have been con- (217)
sidered that the stock could properly be used for voting purposes, and that a proxy could properly be given—that is, regarding the stock as held simply as collateral, although prima facie the legal ownership of this stock was in Hand; or the jury might draw the inference that this was an ordinary act of ownership exercised by one who regarded himself as the real owner, and then the inference would be different from the one drawn if the other view is taken. I cite these two pieces of evidence simply as illustrations of what I mean when I say that a good deal of the evidence is capable of supporting either view which has been urged upon you, and it will be for the jury to determine with regard to the facts about it. By that I mean, that where either one of two inferences may be drawn it will be for the jury to say which is the proper conclusion.

It has been argued to you by the counsel for plaintiff—and there is one point upon that subject—that there was no justification for the transfers to Hand without the consent of the Delamaters. I am not able to agree with that statement in its entirety. I think the assignment in blank by the Delamaters and the delivery of the certificates in that condition would be sufficient evidence of consent upon the part of the Delamaters that the stock might be used by the Trust Company in any way that was consistent with the original contract. It would (218)
of course give no authority to deal with the stock in any other way; but if there was—as there was undoubtedly—an ordinary collateral loan, this assignment in blank, accompanied by delivery of the certificates in that condition, would in my judgment be sufficient evidence of consent on the part of the Delamaters that the Trust Company might deal with the stock in any way consistent with that contract. If for any reason satisfactory to themselves they chose to have the stock transferred to the name of another person who was simply to hold the title in conformity with the original transaction until the loan was either paid or the transaction closed in some way, as for example by a sale of the stock under the power in the collateral note, I think, and I so instruct you, that the Trust Company might do so without any violation of their duty to the Delamaters. I may indeed say, that this piece of evidence is another illustration like the

two that I gave you before. The form of the transaction is not inconsistent with the view urged upon you by defendant, namely, that it was a collateral loan; neither is it inconsistent with the view taken by the other side; and what inference should be drawn from it, I repeat again, is a matter for the jury to determine.

Now that is the whole case. Without repeating what I have said
(219) to you, there is just the one question in it—at the time this bank closed its doors, was this defendant company the real owner of the stock, or was the stock still held by them as collateral security in accordance with the original contract? Whatever the form of the transaction may have been, whatever the face of these papers—and I mean now especially the certificates—may have shown, you are charged to find, and it is your duty to find, what was the reality of the transaction. If this company was the real owner, then it must respond to the claim of the plaintiff; and if it was not, if it still continued to be in reality merely the holder of this stock as collateral security, then it cannot be held responsible in this case, and your verdict would have to be in favor of the defendant. The burden of proof is upon the plaintiff, to show, to prove to you by the fair weight of the evidence, that the defendant was the real owner of this stock; and if you are unable to come to that conclusion, if the evidence is so balanced that you cannot reach that point, if your minds are unable to decide that the defendant was the real owner, then the plaintiff has failed and your verdict must be for the defendant. If, on the other hand, you are satisfied by the fair weight of the proof that the defendant was the real owner, in spite of the fact that the certificates were in the name of Hand, then it is your duty to find a verdict in favor of the plaintiff for the amount of his claim. The exact amount of the claim will
(220) no doubt be handed to you, in case you find a verdict in favor of the plaintiff.

There are certain points I have been asked to answer, and I will do so, as far as they are affirmed. I shall not read you the points that I refuse, because it would simply be confusing to you, but I shall indicate my answers to the stenographer. The plaintiff's points are:

"1. If the jury find that in November of 1890 the Delamaters were the owners of 230 shares of the stock of the Keystone National Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their note of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly signed by them, accompanied by authority in the defendant corporation in case of default in payment of said note, to sell such shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors; that the defendant corporation in January, 1891, caused said shares to be transferred upon the bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assign-

sent to Hand was not known to, or approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent or approval of Delamaters, or of their assignees, the defendant corporation caused Hand to give powers of attorney, (221) which were acted upon, authorizing proxies to vote for the election of Directors of said Bank and to vote for the reduction of its capital stock; the corporation defendant caused the certificate of 230 shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000 and took in lieu thereof, in the name of W. W. Hand, for its benefit, 172½ shares of the stock of said Bank; that the said shares have ever since remained on the books of the Bank in the name of Hand; that at the several times of issuance to Hand of the certificates for 230 shares, and of the issuance to him of the 172½ shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that in pursuance of said information the assignee asked and obtained in their accounts credit for said shares; that before and after the failure of the bank, the corporation defendant in writing informed the officers of the Bank that it was the owner of said 172½ shares; that there has been no interference of any sort or kind since January, 1891, by the Delamaters or their assignees with the corporation defendant (222) in the possession and use of said shares; and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15,000 and no admission by them has been made of any indebtedness thereon, you must find a verdict for the plaintiff."

Answer of the Court: That point is refused. There is additional evidence in the case for the consideration of the jury.

"2. If the jury find that in November of 1890, the Delamaters were the owners of 230 shares of the stock of the Keystone National Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their note of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly signed by them, accompanied by authority in the defendant corporation in case of default in payment of said note, to sell such shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors; that the defendant corporation in January, 1891, caused said shares to be transferred upon the Bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment to Hand was not known to, nor approved of, by Delamaters or their assignees; that (223) subsequently, anterior to the year 1895, without the knowledge, assent or approval of Delamaters, or of their assignees, the defendant

corporation caused Hand to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of Directors of said Bank and to vote for the reduction of its capital stock; the corporation defendant caused the certificate of 230 shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000 and took in lieu thereof, in the name of W. W. Hand, for its benefit, 172½ shares of the stock of said Bank; that the said shares have ever since remained on the books of the Bank in the name of Hand; that at the several times of issuance to Hand of the certificate for 230 shares and of the issuance to him of the 172½ shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that in pursuance of said information the assignees asked and obtained in their accounts credit
(224) for said shares; that before and after the failure of the Bank, the corporation defendant in writing informed the officers of the Bank that it was the owner of said 172½ shares; that there has been no interference of any sort or kind since January, 1891, by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares; and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15,000 and no admission by them has been made of any indebtedness thereon, you may find that prior to the failure of the Bank, there was a conversion by the defendant corporation to its own use of said shares of stock. If you find there was such a conversion, you must find a verdict for the plaintiff."

Answer of the Court: That point appears to confine the Jury to the evidence therein recited, and for this reason is refused. There is additional evidence in the case upon the question of conversion which the Jury will consider.

"3. You must find a verdict for the plaintiff for the amount of his claim."

Answer of the Court: That point is refused.

"4. If you find there was a deposit with the corporation defendant by the Delamaters of the 230 shares of the Bank stock with a blank power, to transfer, as collateral security for their note of $15,000 with
(225) authority in the defendant corporation in case of default in payment of the note to sell the shares; this did not justify it, before it had made any sale of the shares, after default, to cause the same to be transferred to W. W. Hand, if there was no agreement or consent by Delamaters or their assignees to such transfer."

Answer of the Court: That point is refused.

"5. If you find that prior to the failure of the Bank, the defendant corporation asserted to the assignees and to the Bank, that it was the owner of the shares; that the shares were transferred in January, 1891, into the name of Hand without the knowledge or assent of Delamaters or their assignees; that in 1895, or thereabouts, prior to the failure of the Bank, the corporation defendant, without the knowledge or assent of Delamaters or their assignees, caused proxies to be given by Hand, which were acted upon, to vote upon said shares in the election of Directors and for a reduction of its capital; and that 57½ of the shares without such knowledge or assent were surrendered to the Bank by the corporation defendant, antecedently to the Bank's failure, then you may find a verdict for the plaintiff."

Answer of the Court: That point is refused. There is additional evidence in the case for the consideration of the Jury.

The defendant's points I answer as follows: (226)

"1. A creditor who holds shares in a national bank as collateral security for an indebtedness of the real owner of the shares is not liable as a stockholder for an assessment made upon those shares by the Comptroller of the Currency under the provisions of the National Banking Act, even though such creditor has caused the shares to be transferred into the name of an employee, in whose name the shares are registered upon the books of the bank at the date of the assessment."

Answer of the Court: That point is affirmed.

"2. The circumstance that Mr. Atherton as an officer of the Fidelity Company referred to that Company as the 'owner' of these shares in the correspondence had with the officers of the Keystone National Bank of Erie, does not of itself prove that the Fidelity Company was the absolute owner of the shares so as to render that Company liable to an assessment as a stockholder, if the jury find from the correspondence between the same parties, or the other evidence in the case, that the Fidelity Company in fact held the shares registered in the name of W. W. Hand as collateral security for a debt of Delamater & Co."

Answer of the Court: That point is affirmed.

"3. The word 'owner' does not of necessity import absolute ownership—it can properly be used in the reference to the title of one who (227)
is a pledgee in possession of personal property. The nature of the ownership is to be determined by all the evidence in the case."

Answer of the Court: This point is also affirmed, and I add to it this instruction—the sense in which the word was used in the present case is for the jury to decide, in the light of all the evidence that has been given bearing upon the subject.

"4. The fact that the Fidelity Company provided the means with which to pay the 25% assessment ordered by the Comptroller of the

Currency prior to the final closing of the Bank, and that the Fidelity Company authorized Mr. Hand to assent to the reduction of the capital of the Bank, does not tend in any way to fix upon the Fidelity Company the liability of a stockholder to pay the assessment for which this suit is brought."

Answer of the Court: That point is refused. This is a circumstance for the jury's consideration.

"5. The uncontradicted evidence in the case shows that the Fidelity Company received the shares in question as collateral for an indebtedness of Delamater & Company, that Delamater & Company shortly afterwards made an assignment for the benefit of creditors, that from the assigned estate a small percentage upon the indebtedness
(228) was paid, and that the Fidelity Company thereafter and until the closing of the Keystone Bank continued to hold the shares as collateral for the balance of the debt—that shortly after the Fidelity Company received the original certificates as collateral it caused a transfer of the shares to be made into the name of W. W. Hand, a clerk in its employ, and subsequently advanced the funds necessary to pay an assessment of 25% levied on the shares by the Comptroller, and also authorized Mr. Hand to assent to a reduction of the capital of the Bank, and exchange the certificates originally issued to him for certificates representing a reduced pro rata interest in the capital.

Upon this uncontradicted evidence it is the duty of the jury to find a verdict for the defendant."

Answer of the Court: That point is refused because binding instructions are asked.

"6. Under all the evidence the verdict must be for the defendant."

Answer of the Court: That point is reserved. I shall put it in this form—the Court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim.

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(229) Counsel for plaintiff except to the answer of the Court to the plaintiff's first, second, third, fourth and fifth points; also to the answer of the Court to the defendant's first, second, third and sixth points; and also to the Court saying in the general charge that the only question in the case is one of fact; and also to that portion of the charge in which the Court deals with the matter of the right to put the stock in the name of Hand.

Counsel for defendant excepts to that portion of the charge which submits to the jury the question, whether from all the circumstances they find that the Fidelity Company regarded itself as the real owner of the shares of stock, and conducted itself with reference to them

in that character; also to the refusal of the fourth and fifth points of the defendant, and the failure to charge as requested in the sixth point.

And thereupon, the counsel for the said plaintiff did then and there (230) except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said plaintiff did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the plaintiff did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 24th day of December, 1900.

JOHN B. McPHERSON,
Judge.

Form of bill of exceptions agreed to.

R. C. DALE,
Dec. 24, 1900, for deft.

Endorsed: U. S. Circuit Court. In Assumpsit April Session 1899. No. 6. Bill of Exceptions. Frank M. Hayes, Receiver of The Keystone National Bank of Erie, Pa. vs. The Fidelity Insurance, Trust and Safe Deposit Company. Filed Dec. 24 1900. Samuel Bell, (231) Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of the Keystone National Bank of Erie, Pa., Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY, Defendant.

April Session, 1899. No. 6.

IN ASSUMPSIT.

To the Clerk of said Court:

Please enter rule in the above entitled cause to show cause why a new trial should not be allowed for the following, among other reasons:

First; Because the verdict of the jury is against the law and the evidence.

Second; Because the learned Court erred in refusing to affirm the first point submitted by the plaintiff, which was as follows:

1. "If the Jury find that in November of 1890 the Delamaters were the owners of 230 shares of the stock of the Keystone Nat. Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their note of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on
(232) the back, to transfer, duly signed by them, accompanied by authority in the defendant corporation in case of default in payment of said note, to sell said shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors; that the defendant corporation in January, 1891, caused said shares to be transferred upon the Bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment to Hand was not known to, or approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent or approval of Delamaters, or of their assignees, the defendant corporation caused Hand to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of Directors of said Bank and to vote for the reduction of its capital stock; the corporation defendant caused the certificates of 230 shares to be surrendered to the Bank at the time its capital stock was reduced from $250,000 to $150,000 and took in lieu thereof, in the name of W. W. Hand, for its benefit, 172½ shares of the stock of said Bank; that the said shares have ever since remained on the books of the Bank in the name of Hand; that at the several times of issuance to Hand of the certificate for 230 shares and of the issuance to him of the 172½ shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the
(233) same, that in 1895 the assignees of Delamaters called at the office of the corporation defendant and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that in pursuance of said information the assignees asked and obtained in their accounts a credit for said shares; that before and after the failure of the bank, the corporation defendant in writing informed the officers of the Bank that it was the owner of said 172½ shares; that there has been no interference of any sort or kind since January, 1891, by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares;

and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15,000 and no admission by them has been made of any indebtedness thereon, you must find a verdict for the plaintiff."

Third. Because the learned Court erred in refusing to affirm the second point submitted by the plaintiff, which was as follows:

2. "If the Jury find that in November of 1890, the Delamaters were the owners of 230 shares of the stock of the Keystone Nat. Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their note of $15,000 with the defendant corporation and delivered the shares of stock with blank powers on the back, to transfer, duly signed by them, accompanied by authority in (234)
the defendant corporation in case of default in payment of said note, to sell said shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors; that the defendant corporation in January, 1891, caused said shares to be transferred upon the Bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment to Hand was not known to, nor approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent or approval of the Delamaters, or of their assignees the defendant corporation caused Hand to give powers of attorney which were acted upon, authorizing proxies to vote for the election of Directors of said Bank to vote for the reduction of its capital stock; the corporation defendant caused the certificates of 230 shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000, and took in lieu thereof, in the name of W. W. Hand, for its benefit 172½ shares of the stock of said Bank; that the said shares have ever since remained on the books of the Bank in the name of Hand; that at the several times of issuance to Hand of the certificates for 230 shares, and of the issuance to him of the 172½ shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the cor- (235)
poration defendant and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that in pursuance of said information the assignees asked and obtained in their accounts credit for said shares; that before and after the failure of the Bank, the corporation defendant in writing informed the officers of the Bank that it was the owner of said 172½ shares; that there has been no interference of any sort or kind since January, 1891, by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares; and no demand has been made upon Delamaters since 1891 for the payment of their note for $15,000 and no admission by them has been made of any in-

debtedness thereon, you may find that prior to the failure of the Bank, there was a conversion by the defendant corporation to its own use of said shares of stock. If you find there was such conversion, you must find a verdict for the plaintiff."

Fourth; Because the learned Court erred in refusing to affirm the
(236) third point submitted by the plaintiff, which was as follows:

3. "You must find a verdict for the plaintiff for the amount of his claim."

Fifth; Because the learned Court erred in refusing to affirm the fourth point submitted by the plaintiff, which was as follows:

4. "If you find there was a deposit with the corporation defendant by the Delamaters of the 230 shares of the Bank stock with blank power, to transfer as collateral security for their note of $15,000 with authority in the defendant corporation in case of default in payment of the note to sell the shares; this did not justify it, before it had made any sale of the shares, after default to cause the same to be transferred to W. W. Hand, if there was no agreement or consent by Delamaters or their assignees to such transfer."

Sixth. Because the learned Court erred in refusing to affirm the fifth point submitted by the plaintiff, which was as follows:

5. "If you find that prior to the failure of the Bank, the defendant corporation asserted to the assignees and to the Bank, that it was the owner of the shares; that the shares were transferred in January, 1891, into the name of Hand without the knowledge or assent of Delamaters or their assignees; that in 1892 or thereabouts, prior to the failure of the Bank, the corporation defendant, without the knowledge or assent of Delamaters or their assignees, caused proxies to be given by Hand, which were acted upon, to vote upon said shares in the election of Directors and for a reduction of its capital; and that 57½ of the
(237) shares without such knowledge or assent were surrendered to the Bank by the corporation defendant, antecedently to the Bank's failure, then you may find a verdict for the plaintiff."

Seventh; Because the learned Court erred in affirming the first point submitted by the defendant, which was as follows:

1. "A creditor who holds shares in a national bank as collateral security for an indebtedness of the real owner of the shares is not liable as a stockholder for an assessment made upon those shares by the Comptroller of the Currency under the provisions of the National Banking Act, even though such creditor has caused the shares to be transferred into the name of an employee, in whose name the shares are registered upon the books of the bank at the date of the assessment."

Eighth; Because the learned Court erred in affirming the second point submitted by the defendant, which was as follows:

2. "The circumstance that Mr. Atherton as an officer of the Fidelity Company referred to that Company as 'owner' of these shares in the correspondence had with the officers of the Keystone National Bank of Erie, does not of itself prove that the Fidelity Company was the absolute owner of the shares so as to render that Company liable to an assessment as a stockholder, if the jury find from the correspondence between the same parties, or the other evidence in the case, that (288)
the Fidelity Company in fact held the shares registered in the name of W. W. Hand as collateral security for a debt of Delamater & Co."

Ninth; Because the learned Court erred in affirming the third point submitted by the defendant, which was as follows:

3. "The word 'owner' does not of necessity import absolute ownership—it can properly be used in the reference to the title of one who is a pledgee in possession of personal property. The nature of ownership is to be determined by all the evidence in the case."

Tenth; Because the learned Court erred in not refusing the sixth point submitted by the defendant, which was as follows:

6. "Under all the evidence the verdict must be for the defendant."

The answer of the Court to this point was as follows:

"That point is reserved. I shall put it in this form—the Court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim."

Eleventh; Because the learned Court erred in overruling the objections taken by the plaintiff to the answer of the Court to the plaintiff's first, second, third, fourth and fifth points, also to the answer of (289)
the Court to the defendant's first, second, third and sixth points; and also to the Court's saying in the general charge that the only question in the case is one of fact, and also to that portion of the charge, in which the Court deals with the matter of the right to put the stock in the name of W. W. Hand, to the overruling of each and all of the objections on behalf of the plaintiff to the ruling of the Court, the plaintiff then and there did except upon each of the matters as hereinbefore stated, and exceptions were allowed to the plaintiff by the Court.

Twelfth; Because the verdict of the Jury was contrary to law."

ASA W. WATERS,
JOHN G. JOHNSON,
Attorneys for Plaintiff.

Endorsed: No. 6. U. S. C. C. E. D. of Pa. In Assumpsit. Apl. Sess. 1899. Frank M. Hayes, Receiver of The Keystone National Bank of Erie, Pennsylvania, Plaintiff, vs. The Fidelity Insurance, Trust & Safe Deposit Company, Defendant. Rule for New Trial. Asa W. Waters, John G. Johnson, Attys for Plaintiff. Filed Oct. 20, 1900, Samuel Bell, Clerk.

(240) And afterwards, to wit: on the 3d day of December, 1900, come the parties aforesaid by their counsel aforesaid, and the cause being called for argument sur rule for new trial and having been argued by counsel for the respective parties, and the Court not being fully advised in the premises, takes further time for consideration of the same.

And afterwards, to wit: on the 7th day of December, 1900, come the parties afore-aid by their counsel aforesaid, and the Court being fully advised in the premises, renders the following opinion, viz.:

(241) IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 6. April Session, 1899.

FRANK M. HAYES, Receiver,

vs.

FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY.

MOTION FOR A NEW TRIAL.

McPherson, J.

I think that the facts in this case do not differ materially from the facts in Anderson vs. Phila. Warehouse Co., 111, U. S. 479; and therefore, that in accordance with that decision, which was recognized as correct in Pauley vs. State. Loan Co., 165 U. S. 606, this motion must be refused. In the last named case, several rules relating to the liability of shareholders in national banking associations were laid down by the supreme court, and the fourth of these rules (to be found at the foot of page 619) is evidently founded upon Anderson vs. Warehouse Co. The rule is as follows:

"That if one receives shares of stock in a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibility of a
(242) shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor —the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151."

The case now before me comes precisely within this rule, except that there is no proof of an express agreement that the shares

transferred to Hand on the books of the bank should be held as security for the debt due from the Delamater's, the pledgors and the real owners of the shares, to the Fidelity Company, the creditor and pledgee. It does not seem to me, however, that this difference is important, because the jury have found as a fact that the shares were always thus held by Hand as security, and that when the Fidelity Company caused the name of Hand to be inserted in the blank powers of attorney signed by the pledgors, the Company did so with the intention, not of converting the shares to their own purposes or of treating them as if the Company was the real owner, but solely with the intention that Hand should hold them as trustee for all the parties concerned. This being the fact, and Hand's title being thus in reality a title in trust for both parties to the pledge, I think it should make (243)
no difference that the pledgors did not formally agree that the shares should be transferred. Even if they had refused to agree to the transfer, they have suffered no harm or injury, and it is difficult to seen upon what ground they could be heard to complain. They are not complaining or seeking relief—certainly not in this suit to which they are not parties—but even if they themselves were complaining of the transfer because they did not agree to it expressly, I should still adhere to the opinion that I expressed at the trial, namely: that when they endorsed the certificates in blank and delivered them as collateral security to the Fidelity Co. to hold as pledgee for the loan, the pledgors thus authorized the Company to transfer the certificates to a third person to be held by him in accordance with, but not in opposition to, the terms of the contract of pledge. Hand did hold the shares, as the jury have found, in accordance with the original contract of pledge, and I think therefore that the transfer to him was impliedly authorized by the endorsement in blank and the delivery of the shares to the pledgee.

A new trial is refused.

Endorsed: No. 6. April, 1899; Hayes vs. Fidelity Co.

Opinion refusing new trial. Filed Dec. 7, 1900.

SAMUEL BELL.

Clerk.

(244) IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 6. April Sessions, 1899.

FRANK M. HAYES, Receiver of the Keystone National Bank of Erie, Pennsylvania,

vs.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

Entered judgment on the verdict in the above entitled case.

To the Clerk of the United States Circuit Court:

R. C. DALE.

Endorsed: United States Circuit Court. April Session. 1899. Hayes, Receiver, etc., vs. Fidelity Ins. T. & S. D. Co.

Order to Enter Judgment on verdict.

Filed Dec. 24, 1900.

SAMUEL BELL, Clerk, Per R.

R. C. DALE.

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(245) IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of the Keystone National Bank of Erie, Pennsylvania, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Defendant.

IN ASSUMPSIT.

April Session, 1899.

ASSIGNMENTS OF ERROR.

The plaintiff in error, George H. Higgins, successor to Frank M. Hayes, as Receiver of the Keystone National Bank of Erie, Pa., upon behalf of the creditors of said bank and by direction of the Comptroller of the Currency of the United States by Asa W. Waters, Esq., and John G. Johnson, Esq., his attorneys, now comes and says that in the

record and proceedings in the above entitled cause there is manifest error in this, to wit:

1. That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause an entry in the stock ledger of said bank over the name of W. W. Hand in an account opened with said W. W. Hand, at the request of the defendant corporation, showing the holding and ownership of 172½ shares of the (246)
stock of said bank,—being the stock in issue in this case, and for the collection of the assessment ordered by the Comptroller of the Currency upon which the defendant is sued,—the said stock ledger having first been admitted in evidence, the witness (Higgins) while testifying to the entries in said book as about to state that written over the name of W. W. Hand in the stock ledger of the bank, in the handwriting of its cashier, were the words "The Fidelity Trust and Safe Deposit Company, Philadelphia, Pa." that the entry there had been made in the regular course of business and at the time the certificates at the instance of the defendant were issued in the name of W. W. Hand, pursuant to written instructions from the defendant corporation to the bank, that it was the owner of the stock standing in the name of W. W. Hand and intending to follow the same up by showing that this book for many years, with this entry of the name of the defendant corporation written over that of W. W. Hand together with letters from the defendant corporation stating that it was the owner of the stock, had been open to the inspection of the shareholders and creditors of the bank long before its failure and that the entry was made by the officer of the bank for the purpose of advising the shareholders and creditors of the bank of the information they had that the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia was the real or beneficial owner of the stock which stood in the name of its (247)
agent, W. W. Hand.

2. That the said court erred in overruling the objection of counsel for plaintiff in error to the introduction in evidence at the trial of said cause, by the witness W. W. Hand, who was permitted to testify that the original loan was made by the defendant corporation to Delamater & Co. on November 15, 1890. The witness having previously testified that he had no personal knowledge of the matter, that he never came in contact with the Delamaters, that his only information was obtained from the officers of the Fidelity Co., and that his business was simply that of clerk to make entries on its books and that he had no personal recollection upon the subject, the witness also having testified that the note dated November 15, 1890, was a renewal. It was also objected by counsel that witness was permitted to testify that the signature to the obligation was that of Delamater & Co. without having seen anyone sign the note and without having any personal contact with Delamater & Co. or any member of its firm or any personal recollection of the matter.

3. That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause the following testimony contained in the deposition of John O. McClintock,
(248) a witness produced upon behalf of the plaintiff and one of the assignees for the benefit of creditors in the deed of assignment made by Delamater & Co.

Q. "Did you make a further account in the matter of the assignment of Delamater & Co. as assignees? If so state when and what if anything was said to the best of your recollection in that account in regard to the charge made against you on account of the 230 shares of stock of the Keystone National Bank, heretofore referred to in this deposition?"

A. "On the 13th of July, 1896, we, the assignees of Delamater & Co., filed in the above mentioned case our final account. In this final account we were charged with this item referred to in the question as follows: "Equities in stocks and bonds pledged as collateral on loan unadjusted, as follows: (a) $23,000 stock of the Keystone National Bank of Erie pledges for the loan of the $15,000 appraised at $8,000" and we were credited with item No. 48 as follows: "Accountants claim credit for the item of $23,000 Keystone National Bank stock pledged for loan of $15,000 charged at $8,000. (The trial court admitted the testimony to this point excluding what follows) said stock having been converted by the holder of the note and said stock having been assessed
(249) to the amount of 25% of its face value did not sell for enough to pay the debt for which it was pledged."

Q. Was this credit in your second and final account allowed by an order of the court?"

A. "It was. The account as filed was finally confirmed by the court."

Q. "Will you state when and where it is recorded?"

A. "It was finally confirmed and allowed on the first Monday of August, 1896, and is recorded in the account book No. 1 at page 539 of records of the Court of Common Pleas of Crawford Co., Pa."

Q. "This final account of yours, as assignee, of Delamater & Co. was filed then more than one year after your meeting with the defendant company on or about the first of May, 1895? What connection, if any, had that meeting with your statement in your account with reference to this account?

A. "In relation to this equity?"

Q. "Yes."

A. "The statement made by us in our claim of credit for this item of $8,000 was made from the information obtained by us in our interview with the officer of the defendant company on or about the first of May, 1895."

4. That the said court erred in refusing to permit counsel for the (250)
plaintiff in error to introduce at the trial the following testimony in the deposition of Geo. W. Haskins, one of the co-assignees for the benefit of creditors of Delamater & Co., and a witness produced upon behalf of creditors of plaintiff in error, as follows, to wit:

Q. "I hand you the final and last account that you filed in that assigned estate and ask you to look at item No. 48 and refresh your memory in regard to it and state the matter therein set forth."

A. "In our final account item No. 48 the accountants claim credit for the item of $23,000 Keystone National Bank of Erie stock pledged for the loan of $15,000 charged at $8,000 (The trial judge admitted this much of the answer but refused to admit what follows in this answer and the following answers here quoted). Said stock having been converted by the holder of the note and said stock having been assessed to the amount of 25% of its face value did not sell for enough to pay the debt for which it was pledged. This final account was allowed and approved by the Court of Common Pleas of Crawford Co., Pa., in the matter of the assignment of Delamater Co., entered to No. 32 February Term, 1891."

Q. "When was the account finally confirmed?"

A. "On the first Monday of August, 1896." (251)

5. That the agreements as to facts and the matters therein contained and the evidence produced at the trial of the above entitled cause are not sufficient in law for the said defendant to have or maintain its aforesaid judgment against the said plaintiff in error; the said defendant thereby being estopped to deny its liability for the assessment levied by the Comptroller of the Currency of 100% upon th 172½ shares of the capital stock of said Keystone National Bank of Erie with interest thereon at 6% per annum from the day the same was made payable, December 3, 1897.

6. That by the record in the above entitled cause it appears that the verdict of the jury and the judgment was given for the said Fidelity Insurance, Trust & Safe Deposit Company against the said Frank M. Hayes as Receiver of the Keystone National Bank of Erie, Pa. Whereas by the law of the land the verdict of the jury and the judgment ought to have been given for the said Frank M. Hayes as Receiver of the Keystone National Bank of Erie, Pa., against the said Fidelity Insurance, Trust & Safe Deposit Company in the sum of $17,250 with interest at 6% per annum from December 3, 1897.

7. That the said court erred in refusing to give to the jury the following instruction (plaintiffs first point) requested by the plaintiff in error at the trial of said cause, the facts set forth therein and if found true by the jury, constituting an estoppel in law to the defendant to (252)
deny its liability for the collection of the assessment sued on. The said first point being in words as follows, to wit;

"1. If the Jury find that in November of 1890 the Delamaters were the owners of 230 shares of the stock of the Keystone National Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their note of $15000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly signed by them, accompanied by authority in the defendant corporation in case of default in payment of said note, to sell said shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors, that the defendant corporation in January, 1891, caused said shares to be transferred upon the Bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment to Hand was not known to, or approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent or approval of Delamaters, or of their assignees, the defendant corporation caused Hand to give powers of attorney, which were acted upon, authorizing
(253) proxies to vote for the election of Directors of said Bank and to vote for the reduction of its capital stock; the corporation defendant caused the certificate of 230 shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000 and took in lieu thereof, in the name of W. W. Hand, for its benefit, 172½ shares of the stock of said Bank; that the said shares have ever since remained on the books of the Bank in the name of Hand; that at the several times of issuance to Hand of the certificate for 230 shares and of the issuance to him of the 172½ shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that in pursuance of said information the assignees asked and obtained in their accounts credit for said shares; that before and after the failure of the bank, the corporation defendant in writing informed the officers of the Bank that it was the owner of said 172½ shares; that
(254) there has been no interference of any sort or kind since January, 1891, by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares; and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15000 and no admission by them has been made of any indebtedness thereon, you must find a verdict for the plaintiff."

8. That the said court erred in refusing to give to the Jury the following instruction (being plaintiff's second point) requested at the trial of the above entitled cause by the plaintiff in error. The said second point being in words as follows, to wit:

2. "If the Jury find that in November of 1890, the Delamaters were the owners of 230 shares of the stock of the Keystone National Bank

of Erie; that being such owners at said time, they pledged said shares as collateral security for their note of $15000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly signed by them, accompanied by authority in the defendant corporation in case of default in payment of said note, to sell said shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors; that the defendant corporation in January, 1891, caused said shares to be transferred upon (255) the Bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment to Hand was not known to, nor approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent or approval of Delamaters, or of their assignees, the defendant corporation caused Hand to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of Directors of said Bank, and to vote for the reduction of its capital stock; the corporation defendant caused the certificate of 230 shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000 and took in lieu thereof, in the name of W. W. Hand, for its benefit 172½ shares of the stock of said Bank; that the said shares have ever since remained on the books of the bank in the name of Hand; that at the several times of issuance to him of the 172½ shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that in pursuance of said information the assignees asked and obtained in their accounts credit for said shares; that before and after the failure of the Bank, the corporation defendant in writing informed the officers of the Bank that it was the owner of said 172½ shares; that there has been no interference of any sort or kind since January, 1891, (256) by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares; and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15000 and no admission by them has been made of any indebtedness thereon, you may find that prior to the failure of the Bank, there was a conversion by the defendant corporation to its own use of said shares of stock. If you find there was such conversion, you must find a verdict for the plaintiff."

9. That the said court erred in refusing to give to the jury at the trial of the above entitled cause, binding instructions for the plaintiff in error for the amount of his claim, (upon the law and evidence) being the third point of charge requested by the plaintiff in words as follows, to wit: "3. You must find a verdict for the plaintiff for the amount of his claim."

(257) 10. That the said Court erred in refusing to give to the jury the following instruction (being plaintiff's fourth point) requested at the trial of said cause by the plaintiff in error. The said fourth point being words as follows, to wit:

"4. If you find there was a deposit with the corporation defendant by the Delamaters of the 230 shares of the Bank stock with a blank power to transfer, as collateral security for their note of $15,000 with authority in the defendant corporation in case of default in payment of the note to sell the shares; this did not justify it, before it had made any sale of the shares, after default, to cause the same to be transferred to W. W. Hand, if there was no agreement or consent by Delamaters or their assignees to such transfer."

11. That the said Court erred in refusing to give to the jury the following instruction (being plaintiff's fifth point) requested at the trial of said cause by the plaintiff in error. The said fifth point being in words as follows, to wit:

"5. If you find that prior to the failure of the Bank, the defendant corporation asserted to the assignees and to the Bank, that it was the
(258) owner of the shares; that the shares were transferred in January, 1891, into the name of Hand without the knowledge or assent of Delamaters or their assignees; that in 1895, or thereabouts, prior to the failure of the Bank, the corporation defendant, without the knowledge or assent of Delamaters or their assignees caused proxies to be given by Hand, which were acted upon, to vote upon said shares in the election of Directors and for a reduction of its capital; and that 57½ of the shares without such knowledge or assent were surrendered to the Bank by the corporation defendant, antecedently to the Bank's failure, then you may find a verdict for the plaintiff."

12. That the said Court erred in giving the following instruction to its general charge to the jury, namely, that the whole subject is a question of fact and not of law. The contention of the plaintiff in error being that the defendant is estopped by the evidence produced at the trial as a matter of law from denying its liability for the assessment.

13. That the said Court erred in giving the following instruction during the course of the charge to the jury at the trial of said cause, to wit: That without the knowledge, consent or ratification of the Delamaters, Delamater & Co. or the assignees of Delamater & Co., said defendant corporation had the implied
(259) right, by reason of its holding blank powers to transfer the title of the shares of stock in question, to secretly transfer the same on the books of the bank to the name of its own agent, retaining control thereof in itself and to thereby create without the knowledge, consent or ratification of the Delamaters or their assignees and without notice

to the bank, its own agent a trustee for the Delamaters or their assignees.

14. That the said Court erred in giving instruction to the jury at the trial of said cause during the course of the charge to the effect that the only question in the case was one of fact as to whether or not the said defendant was the real owner of the stock as distinguished from its being a pledgee of the stock and that the registering of the stock on the books of the bank by the defendant in the name of its agent releases it from liability for the assessment in case the jury found that it held the same as a pledgee and not as a real owner.

15. That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit: "The burden of proof is upon the plaintiff to show, to prove to you by the fair weight of the evidence that the defendant was the real owner of this stock and if you are unable to come to that conclusion, if the evidence is so balanced that you cannot reach that point, if your minds are unable to decide that the defendant was the real owner, then the plaintiff has (260) failed and your verdict must be for the defendant."

16. That the said Court erred in instructing the jury during the course of its charge in all that portion thereof in which the Court deals with the matter of the right of the defendant to put the stock in the name of Hand.

17. That the said Court erred in giving the following instruction to the jury (being defendant's first point) requested by the defendant in error at the trial of said cause. The said defendant's first point being in words as follows, to wit:

1. A creditor who holds shares in a national bank as collateral security for an indebtedness of the real owner of the shares is not liable as a stockholder for an assessment made upon these shares by the Comptroller of the Currency under the provisions of the National Banking Act, even though such creditor has caused the shares to be transferred into the name of an employee, in whose name the shares are registered upon the books of the bank at the date of the assessment."

18. That the said Court erred in giving the following instruction to the jury (defendant's second point) requested at the trial by the defendant in error. The said second point being in words as follows, to wit:

"2. The circumstance that Mr. Atherton as an officer of the Fidelity (261) Company referred to that Company as the 'owner' of these shares in the correspondence had with the officers of the Keystone National Bank of Erie, does not of itself prove that the Fidelity Company was the absolute owner of the shares so as to render that Company liable to an assessment as a stockholder, if the jury find from the correspond-

ence between the same parties, or other evidence in the case, that the Fidelity Company in fact held the shares registered in the name of W. W. Hand as collateral security for a debt of Delamater & Co."

19. That the said Court erred in giving the following instruction to the jury (being defendant's third point). The said defendant's third point being in words as follows, to wit:

"3. The word 'owner' does not of necessity import absolute ownership—it can properly be used in the reference to the title of one who is a pledgee in possession of personal property. The nature of the ownership is to be determined by all the evidence in the case."

20. That the said Court erred in its answer to the defendant's sixth point as an instruction to the jury at the trial that "under all the evi-
(262) dence the verdict must be for the defendant." The said trial judge upon this sixth point of the defendant instructing the jury in answer to said point in words as follows, to wit:

"That point is reserved. I shall put it in this form, "the Court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim."

21. That the said Court erred in refusing a new trial in said cause, and in holding "that the facts in this case do not differ materially from the facts in Anderson vs. Philadelphia Warehouse Co. 111 U. S. 479."

And the said George H. Higgins as receiver of the Keystone National Bank of Erie, Pa., prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing and that he may be restored to all things to which he hath lost by occasion of said judgment, etc.

ASA W. WATERS,
Attorneys for Plaintiff in error.

Endorsed: U. S. C. C. E. D. of Pa. Frank M. Hayes, Receiver, vs. The Fidelity Insurance, Trust and Safe Deposit Company. In Assumpsit. April Session 1899. No. 6. Assignments of Error. Asa W. Waters, John G. Johnson, pro plaintiff. Filed Dec. 24, 1900. Samuel Bell, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN (263)
AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Pennsylvania, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Defendant.

IN ASSUMPSIT.

April Session, 1899. No. 6.

PETITION FOR WRIT OF ERROR.

To the Honorable the Judges of said Court:

George H. Higgins, the successor to said Frank M. Hayes as receiver of the Keystone National Bank of Erie, Pa., plaintiff in the above entitled cause, feeling himself aggrieved by the verdict of the jury and the judgment entered on the 24th day of December, 1900, comes now by Asa W. Waters, Esq., and John G. Johnson, Esq., his attorneys, and petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Third Circuit, under and according to the laws of the United States, in that behalf made and provided (first presenting herewith the assignments of error relied upon and filed herewith) and also that (264)
an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray.

ASA W. WATERS,
JOHN G. JOHNSON,
Attorneys for Plaintiff.

Allowed
By the Court.

Endorsed: U. S. C. C. E. D. of Pa. Frank M. Hayes, Receiver, vs. The Fidelity Insurance, Trust and Safe Deposit Company. In Assumpsit. April Session 1899. No. 6. Petition for Writ of Error. Asa W. Waters, John G. Johnson, Attorneys for Plaintiff. Filed Dec. 24. 1900, Samuel Bell, Clerk.

(265) IN THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Pennsylvania, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Defendant.

April Session, 1899. No. 6.

IN ASSUMPSIT.

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendant herein that the stipulation as to proof of the incorporation of the Keystone National Bank of Erie, Pa.; the appointment of receivers and order levying the assessment (herein sued on) by the Comptroller of the Currency, etc., etc., and filed of record, and the depositions filed of record taken in behalf of the plaintiff are set forth in the Bill of Exceptions as signed, sealed and allowed, and the further printing of the same in the transcript of the record in the proceedings in error to the United States Circuit Court of Appeals for the Third Circuit is waived and it is also agreed that the exhibits offered in evidence at the trial which it is necessary to print in the transcript of the record in the proceedings in error aforesaid are set forth in said Bill of Exceptions as allowed signed and sealed, and any further printing of the exhibits in the transcript of the record referred to is waived.

(266)

ASA W. WATERS,
Attorneys for Plaintiff.

RICHARD C. DALE,
Attorneys for Defendant.

Endorsed: U. S. C. C. E. D. of Pa. Frank M. Hayes, Receiver, vs. The Fidelity Insurance, Trust and Safe Deposit Company, In Assumpsit. April Session 1899. No. 6. Stipulation. Filed Dec. 24 1900. Samuel Bell, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES, IN (267)
AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FRANK M. HAYES, Receiver of The Keystone National Bank of Erie, Pennsylvania, Plaintiff,

vs.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Defendant.

April Session, 1899. No. 6.

IN ASSUMPSIT.

Know all men by these presents, That I, George H. Higgins as receiver of the Keystone National Bank of Erie, Pa., am held and firmly bound unto the Fidelity Insurance, Trust and Safe Deposit Company, defendant above named, in the sum of five hundred dollars ($500) to be paid to the said Fidelity Insurance, Trust & Safe Deposit Company, to which payment well and truly to be made I bind myself as such receiver, my successor or successors, firmly by these presents.

Sealed with my seal and dated the 22d day of December, 1900.

Whereas the above named plaintiff, Frank M. Hayes as receiver of the Keystone National Bank of Erie, Pa., has resigned and George H. Higgins has been duly appointed receiver of said bank in his place and stead and has been substituted as plaintiff in said cause and has sued (268)
out a writ of error to the United States Circuit Court of Appeals for the Third Circuit, to reverse the judgment in the above entitled cause by the Circuit Court of the United States for the Eastern District of Pennsylvania.

Now, therefore, the condition of this obligation is such that if the above named substituted plaintiff, George H. Higgins, as receiver of the Keystone National Bank of Erie, Pa., shall prosecute said writ to effect and answer all costs and damages if he shall fail to make good his plea, then his obligation shall be void, otherwise to remain in full force and virtue.

GEO. H. HIGGINS, [Seal]
As Receiver of the Keystone National Bank of Erie, Pa.

I hereby agree to the above bond.

R. C. DALE,
Attorney for Defendant.

Approved.

Endorsed: U. S. C. C. E. D. of Pa. Hayes, Receiver, vs. Fidelity Company. In Assumpsit. April Session 1899. No. 6. Bond sur Writ of Error Filed Dec. 24, 1900, Samuel Bell, Clerk.

(269) UNITED STATES OF AMERICA, } *sct.*
EASTERN DISTRICT OF PENNSYLVANIA. }

I, Samuel Bell, Clerk of the Circuit Court of the United States of America, for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true, complete and faithful copy of the original Pleas and Proceedings in the case of George H. Higgins, Receiver, vs. The Fidelity Insurance, Trust & Safe Deposit Company, No. 6, April Session, 1899, on file and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 16th day of January, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-fifth.

SAMUEL BELL,
Clerk of C.C.

And afterwards to wit: on the sixth day of March A. D. 1901, this cause being called for argument on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, before Hon. M. W. Acheson, Hon. George M. Dallas, and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit: on the twenty-ninth day of April, A. D. 1901, comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:—

In the United States Circuit Court of Appeals for the Third Circuit.

GEORGE H. HIGGINS, Receiver of the Keystone National Bank of Erie, Plaintiff in Error,
vs.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Defendant in Error.

Error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Acheson, Dallas, and Gray, circuit judges.

ACHESON, *Circuit Judge:*

This was an action brought by George H. Higgins, receiver of the Keystone National Bank of Erie, an insolvent national banking association, against The Fidelity Insurance, Trust and Safe Deposit Company to recover the amount of an assessment on stockholders of the bank made under section 5151 of the Revised Statutes, upon the allegation that the defendant was a shareholder of the bank at the time of its failure and thus liable to creditors for the assessment sued for.

It appears that on November 15th 1890 the defendant company made a loan of $15,000 to the firm of Delamater & Co. (in renewal of prior loans) for which Delamater & Co. gave to the defendant their note for $15,000, dated November 15th 1890, payable in sixty days, and as collateral security for the payment of this note deposited with the defendant two hundred and thirty shares of the capital stock of the Keystone National Bank of Erie, each share being of the par value of $100; one hundred and thirty shares thereof standing in the name of George B. Delamater and one hundred shares thereof standing in the name of George W. Delamater. With the certificates of the stock thus deposited blank powers of attorney to assign and transfer the same, signed by George B. Delamater and George W. Delamater, respectively, were delivered to the defendant. On December 5th 1890 the firm of Delamater & Co. made a general assignment for the benefit of creditors. On January 10th 1891 the defendant sent to the Keystone National Bank of Erie the original certificates so deposited as collateral, with direction to the

bank to transfer the same into the name of W. W. Hand, who was a clerk in the employ of the defendant. This transfer was made on the books of the bank, and new certificates were issued in the name of W. W. Hand, dated January 15th 1891, and were transmitted by the bank to the defendant. Hand signed a transfer in blank on the back of each of the new certificates and in that form they were retained by the defendant. On March 16th 1892 the Comptroller of the Currency finding that the capital of the bank was impaired ordered an assessment of twenty-five per centum on the capital of the bank to make good the deficiency. The defendant paid this assessment, namely $5,750, on the above-named two hundred and thirty shares of stock and charged the same to Delamater & Co. as an additional advance. On December 22, 1892, pursuant to section 5143 of the Revised Statutes of the United States, with the approval of the Comptroller of the Currency, the capital stock of the bank was reduced from $250,000 to $150,000, divided into fifteen hundred shares of $100 each. On January 24th 1893, the defendant sent to the bank the certificates which had been issued to W. W. Hand for the two hundred and thirty shares, and on February 7th 1893 the defendant received from the bank a certificate in the name of W. W. Hand for one hundred and seventy-two and one-half shares being the reduced number. Hand signed a transfer in blank on the back of the new certificate and in that form it remained in the defendant's possession. On one or more occasions Hand gave a proxy to vote at the annual meeting of stockholders and he also gave a proxy to vote at the special meeting of the stockholders in favor of the reduction of the capital stock. On June 20th 1897 the Keystone National Bank of Erie closed its doors, and on July 26th 1897 the Comptroller of the Currency appointed a receiver of the bank. On November 3d 1897 the comptroller ordered an assessment of one hundred per centum on the stockholders.

The court submitted to the jury the question of fact whether or not the defendant had changed its relations to the stock from that of pledgee to that of owner. The question so submitted was thus stated by the learned trial judge in his charge:

"The question is whether before this Keystone National Bank failed, the defendant company—the Fidelity Trust Company of this city—was the real owner of these shares of stock, or whether it continued to be the pledgee of the stock; whether the stock had become theirs in the sense in which we use in ordinary speech the word owner, or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence."

Again the learned trial judge said to the jury:

"The whole subject, as I regard it—for the present at least—is a question of fact; and that question I repeat is whether the defendant company, The Fidelity Trust Company, was at the time when this bank went into the hands of the receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters."

The verdict of the jury was in favor of the defendant, and subsequently the court entered judgment for the defendant on the verdict.

Undoubtedly, this stock originally was pledged by the owners, the Delamaters, to the defendant company *was collateral security.* Wrongful conversion by the defendant is negatived by the verdict. Upon the finding of the jury it must be accepted as established that the defendant did not intentionally change its relation to the stock. This, we think, is very clear under the uncontradicted evidence. Did the defendant do anything whereby contrary to its intention it became the absolute owner of the stock? The payment of the *pro rata* share of the assessment ordered by the Comptroller of the Currency to make good the impairment of the capital stock of the bank was for the protection and benefit of all interested in the pledged stock and was entirely consistent with the preservation of the pledge. The assent to the reduction of the capital stock of the bank made agreeably to the statute, under the approval of the Comptroller of the Currency, did not work any prejudice whatever to the pledgors or their assignees, and we do not see how it could change the relation of the defendant to the stock. It is said, however, that the defendant had no right to transfer the stock to W. W. Hand without the express consent of the Delamaters or their assignees. But we agree with the views expressed by the circuit court that the delivery by the Delamaters of the certificates with the blank powers to assign and transfer them implied their consent to such a transfer of the stock as might be deemed reasonably necessary for the protection of the defendant. The transfer to Hand was not in hostility to the pledge but subservient to it. He held the legal title for the benefit of all interested in the stock—the pledgee first and then the pledgors and their assignees. Moreover neither the pledgors nor their assignees are complaining. They are not parties here. This suit is by the receiver of the bank against the defendant company to subject it to the personal liability imposed upon shareholders by section 5151 of the Revised Statutes of the United States.

Does this record disclose as against the defendant any ground for such liability? The court below answered the question negatively, and, we think, rightly. This conclusion accords with the decisions of the Supreme Court of the United States in Anderson *v.* Philadelphia Warehouse Company, 111 U. S., 479, and in Pauly *v.* State Loan and Trust Company, 165 U. S., 606, 619. The stock in the Keystone National Bank of Erie owned by the Delamaters and by them pledged to the Fidelity Insurance, Trust and Safe Deposit Company never stood on the registry or books of the bank in the name of the company and in fact the company was mere pledgee.

In Anderson *v.* Philadelphia Warehouse Company, *supra,* Chief Justice Waite said: "It is, also, undoubtedly true, that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder, but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner." And it was there ruled that a pledgee of national bank

stock who was unwilling to assume the liability of a registered shareholder, acting in good faith and with no fraudulent intent, might lawfully cause the pledged stock to be transferred to and registered in the name of an irresponsible employee for the purpose of perfecting the security of the pledgee without incurring a shareholder's liability. Here, the defendant company acted in perfect good faith. At the time of the transfer to Hand, the Keystone National Bank of Erie was in good credit. Moreover, the defendant was under no personal liability, for it was not registered as owner.

The facts of the defendant's case, we think, bring it clearly within the principle laid down in Pauly *v.* State Loan and Trust Company, *supra*, namely: That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151.

We are not able to see that any one of the numerous assignments of error is well founded. Upon the whole case we are of opinion that judgment in favor of the defendant was rightly entered.

The judgment of the circuit court is affirmed.

Filed April 29, 1901.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1901.

GEORGE H. HIGGINS, Receiver of the Keystone National Bank of Erie, Plaintiff in Error,
vs.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Defendant in Error. } No. 10.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, and was argued by counsel.

On consideration whereof; it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, be, and the same is hereby affirmed with costs.

Philadelphia, April 30, 1901.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1901.

GEORGE H. HIGGINS, Receiver of the Keystone National Bank of Erie, Plaintiff in Error,
vs.
THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Defendant in Error,
} No. 10.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

And now to wit this 3rd day of June A. D. 1901, it is ordered that mandate issue to the said circuit court of the United States for the eastern district of Pennsylvania in accordance with the opinion and judgment of this court in said cause.

Approved.

GEO. GRAY, *C. J.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, Greeting: [SEAL.]

Whereas, lately in the circuit court of the United States for the eastern district of Pennsylvania, before you, or some of you, in a cause between George H. Higgins, receiver of the Keystone National Bank of Erie, plaintiff in error, against The Fidelity Insurance, Trust and Safe Deposit Company, defendant in error, wherein the verdict of the jury and judgment of the said circuit court entered in said cause are in the following words, viz:

"And afterwards, to wit: on the 16th of October, 1900, the jury being called come, to wit: Milton Kurtz, John P. Huber, Henry A. Fry, Jesse S. Krebel, James L. Parrington, Freeman Gerberich, W. T. Atkins, Lewis C. Moses, H. Morgan Ruth, Jos. W. Einstein, Joseph Barnett, Philip Quillman, who are duly empanelled, returned, chosen, tried and sworn or affirmed to speak the truth, etc., in the issue joined in this case.

And afterwards, to wit: on the 17th day of October, 1900, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively, do say that they find for the defendant.

1900, December 24.—Præcipe for judgment on the verdict filed. Judgment accordingly."

as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the third circuit by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of March, in the year of our Lord one thousand nine hundred and one, the said cause came on

to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, be, and the same is hereby affirmed with costs, and that the said defendant, The Fidelity Insurance, Trust and Safe Deposit Company, recover against the said plaintiff, George H. Higgins, receiver of the Keystone National Bank of Erie, twenty dollars for its costs herein expended and have execution therefor.

Philadelphia, April 30, 1901.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the third day of June, in the year of our Lord one thousand nine hundred and one.

WM. H. MERRICK,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Costs of Defendant in Error.

Attorney	$20.00
	$20.00

[Endorsed:] U. S. circuit court of appeals, third circuit. No. 10. March term, 1901. George H. Higgins receiver of the Keystone National Bank of Erie plaintiff in error *vs.* Fidelity Insurance Trust and Safe Deposit Company. Mandate.

In the Supreme Court of the United States.

GEORGE H. HIGGINS, as Receiver of the Keystone National Bank of Erie, Pennsylvania, Plaintiff in Error, *vs.* THE FIDELITY INSURANCE, TRUST AND SAFE Deposit Company, Defendant in Error.	October Term, 1900. No. —.

Petition in Error.

To the honorable associate justice of the United States for the third circuit:

Your petitioner, George H. Higgins as receiver of the Keystone National Bank of Erie, Pennsylvania, respectfully shows that on the 21st day of March, 1899, he brought an action of assumpsit against said The Fidelity Insurance, Trust & Safe Deposit Company of Philadelphia, Pennsylvania, defendant in error, in the circuit court of the United States for the eastern district of Pennsylvania under

written directions of the Comptroller of the Currency of the United States so to do, for the recovery of an assessment duly levied by said comptroller amounting to seventeen thousand two hundred and fifty dollars ($17,250) together with interest thereon at 6 % per annum from December 3, 1897, on one hundred seventy-two and one-half (172½) shares of the capital stock of said bank appearing upon the books thereof in the name of one W. W. Hand, an authorized agent of the defendant in error; the said defendant in error being, at the time of the insolvency of said bank, the holder and owner of said shares and a shareholder of said bank within the meaning of section 5151 U. S. Revised Statutes.

Your petitioner says that his said action of assumpsit came on to be heard before said circuit court and a jury, and on October 17, 1900, the said jury found in favor of defendant in error, and a verdict was so returned, and on December 24, 1900, judgment was entered of record by said court in accordance with said verdict and execution was awarded thereon, and thereupon your petitioner being aggrieved by reason of said judgment against him and being directed so to do by said comptroller petitioned for a writ of error to issue to the United States circuit court of appeals for the third circuit praying that said judgment be reviewed and reversed and said writ of error was duly issued with a citation duly servd in accordance with law.

And your petitioner says that said writ of error came on to be heard in the said circuit court of appeals at the March term 1901 thereof and said United States circuit court of appeals for the third circuit on the 29th day of April, 1901, affirmed the judgment of said circuit court in favor of said The Fidelity Insurance, Trust & Safe Deposit Company, defendant in error, filed a written opinion to that effect and directed a mandate to issue to said circuit court to proceed in accordance with said decision and order as will appear by reference to the record and proceedings in said cause.

Your petitioner says that he is aggrieved by reason of the judgment of said circuit court of appeals in the above-entitled action and he respectfully shows that said cause is not one in which the jurisdiction of said circuit court and said circuit court of appeals is dependent upon the fact that the opposite parties to the suit are one of them an alien and the other a citizen of the United States, or one of them a citizen of one State and the other a citizen of a different State but is dependent on the fact that your petitioner as receiver of an insolvent national bank by appointment of the Comptroller of the Currency, with the approval of the Secretary of the Treasury, under the laws of the United States is an officer and agent of the United States for the winding up of the affairs of said insolvent national bank, and this action is a suit of a civil nature arising under the laws of the United States, and for a sum in excess of one thousand dollars ($1,000) besides costs. That said judgment of said circuit court of appeals is final but the jurisdiction thereof in this cause is not final and your petitioner being directed so to do by the said comptroller claims the right to remove the aforesaid judgment of said circuit court of appeals affirming the judgment of said circuit

court, to this honorable court for review, etc. by writ of error by authority of the statutes of the United States (section 6, of the act of March 3, 1891 c. 517, 26 Stat. 826). All of which appears in the record of the proceedings in said case which is hereto submitted.

Your petitioner further says that his petition for a writ of error is not filed for purposes of delay but because he believes there is manifest error in the proceedings aforesaid.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and for a citation and supersedeas, and he will ever pray, etc.

GEO. H. HIGGINS,
Receiver of the Keystone National Bank of Erie, Pennsylvania, Petitioner.
ASA W. WATERS,
—— ——,
Attorneys for Petitioner.

THE UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

George H. Higgins being duly sworn according to law says he was duly appointed receiver of said Keystone National Bank of Erie, Pennsylvania, on or about April 17, 1899 by the Comptroller of the Currency of the United States under authority of the laws of the United States, and that as such receiver he is the petitioner in the foregoing petition and that the facts therein set forth are true to the best of his knowledge, information and belief.

GEO. H. HIGGINS.

Sworn to and subscribed before me this 12th day of September 1901.

[Seal of Henry A. Clark, Notary Public, Erie, Penna.]

HENRY A. CLARK,
Notary Public.

Commission expires Apr. 17th 1903.

[Endorsed:] In the Supreme Court of the United States. October term 1900. No. —. George H. Higgins, as receiver of the Keystone National Bank, of Erie, Pennsylvania, plaintiff in error, *vs.* The Fidelity Insurance, Trust and Safe Deposit Company, defendant in error. Petition in error. Asa W. Waters, John G. Johnson, attorneys pro plaintiff in error. Philadelphia, Pa.

In the Supreme Court of the United States.

GEORGE H. HIGGINS, as Receiver of the Keystone National Bank of Erie, Pennsylvania, Plaintiff in Error,
vs.
THE FIDELITY INSURANCE, TRUST and Safe Deposit Company, Defendant in Error.

No. —. October Term, 1900.

Assignment of Errors.

Now comes George H. Higgins, as receiver of the Keystone National Bank of Erie, Pennsylvania, by Asa W. Waters, Esq., and John G. Johnson, Esq., his attorneys, and says that in the record of proceedings in the above-entitled action in the United States circuit court of appeals for the third circuit there is manifest error in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said circuit court of appeals, to wit:

1. That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause an entry in the stock ledger of said bank over the name of W. W. Hand in an account opened with said W. W. Hand at the request of the defendant corporation, showing the holding and ownership of 172½ shares of the stock of said bank, being the stock in issue in this case and for the collection of the assessment ordered by the Comptroller of the Currency upon which the defendant is sued, the said stock ledger having first been admitted in evidence, the witness (Higgins) while testifying to the entries in said book was about to state that written over the name of W. W. Hand in the stock ledger of the bank, in the handwriting of its cashier, were the words "The Fidelity Trust and Safe Deposit Company, Philadelphia, Pa." that the entry there had been made in the regular course of business and at the time the certificates at the instance of the defendant were issued in the name of W. W. Hand, pursuant to written instructions from the defendant corporation to the bank, that it was the owner of the stock standing in the name of W. W. Hand and intending to follow the same up by showing that this book for many years, with this entry of the name of the defendant corporation written over that of W. W. Hand together with letters from the defendant corporation stating that it was the owner of the stock, had been open to the inspection of the shareholders and creditors of the bank long before its failure and that the entry was made by the officer of the bank for the purpose of advising the shareholders and creditors of the bank of the information they had that the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia was the real or beneficial owner of the stock which stood in the name of its agent, W. W. Hand.

2. That the said court erred in overruling the objection of counsel for plaintiff in error to the introduction in evidence at the trial of said cause, by the witness W. W. Hand, who was permitted to testify that the original loan was made by the defendant corporation to Delamater & Co. on November 15, 1890. The witness having previously testified that he had no personal knowledge of the matter, that he never came in contact with the Delamaters, that his only information was obtained from the officer of the Fidelity Company and that his business was simply that of clerk to make entries on its books and that he had no personal recollection upon the subject, the witness also having testified that the note dated November 15, 1890, was a renewal. It was also objected by counsel that witness was permitted to testify that the signature to the obligation was that of Delamater & Company without having seen any one sign the note and without having any personal contact with Delamater & Co. or any member of its firm or any personal recollection of the matter.

3. That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause the following testimony contained in the deposition of John O. McClintock, a witness produced upon behalf of the plaintiff and one of the assignees for the benefit of creditors in the deed of assignment made by Delamater & Co.

Q. "Did you make a further account in the matter of the assignment of Delamater & Co. as assignees? If so state when and what if anything was said to the best of your recollection in that account in regard to the charge made against you on account of the 230 shares of stock of the Keystone national bank, heretofore referred to in this deposition?"

A. "On the 13th of July, 1896, we, the assignees of Delamater & Co. filed in the above-mentioned case our final account. In this final account we were charged with this item referred to in the question as follows: 'Equities in stocks and bonds pledged as collateral on loan unadjusted, as follows: (*a*) $23,000 stock of the Keystone National Bank of Erie pledged for the loan of the $15,000 appraised at $8,000' and we were credited with item No. 48 as follows: 'Accountants claim credit for the item of $23,000 Keystone National Bank stock pledged for loan of $15,000 charged at $8,000.' (The trial court admitted the testimony to this point excluding what follows) said stock having been converted by the holder of the note and said stock having been assessed to the amount of 25% of its face value did not sell for enough to pay the debt for which it was pledged."

Q. "Was this credit in your second and final account allowed by an order of the court?"

A. "It was. The account as filed was finally confirmed by the court."

Q. "Will you state when and where it is recorded?"

A. "It was finally confirmed and allowed on the first Monday of

August, 1896, and is recorded in the Account Book No. 1 at page 539 of records of the court of common pleas of Crawford Co. Pa."

Q. "This final account of yours, as assignees of Delamater & Co. was filed then more than one year after your meeting with the defendant company on or about the first of May 1895? What connection, if any, had that meeting with your statement in your account with reference to this account?"

A. "In relation to this equity?"

Q. "Yes."

A. "The statement made by us in our claim of credit for this item of $8,000 was made from the information obtained by us in our interview with the officer of the defendant company on or about the first of May 1895."

4. That the said court erred in refusing to permit counsel for the plaintiff in error to introduce at the trial the following testimony in the deposition of George W. Haskins, one of the co-assignees for the benefit of creditors of Delamater & Co. and a witness produced upon behalf of creditors of plaintiff in error as follows, to wit:

Q. "I hand you the final and last account that you filed in that assigned estate and ask you to look at item No. 48, and refresh your memory in regard to it and state the matter therein set forth."

A. "In our final account item No. 48 the accountants claim credit for the item of $23,000 Keystone National Bank of Erie stock pledged for the loan of $15,000 charged at $8,000." (The trial judge admitted this much of the answer but refused to admit what follows in this answer and the following answers here quoted.) "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of 25 % of its face value did not sell for enough to pay the debt for which it was pledged. This final account was allowed and approved by the court of common pleas of Crawford Co., Pa., in the matter of the assignment of Delamater & Co. entered to No. 52 February term, 1891."

Q. "When was the account finally confirmed?"

A. "On the first Monday of August, 1896."

5. That the agreements as to facts and the matters therein contained and the evidence produced at the trial of the above-entitled cause are not sufficient in law for the said defendant to have or maintain its aforesaid judgment against the said plaintiff in error; the said defendant thereby being estopped to deny its liability for the assessment levied by the Comptroller of the Currency of 100 % upon the 172½ shares of the capital stock of said Keystone National Bank of Erie with interest thereon at 6 % per annum from the day the same was made payable, December 3, 1897.

6. That by the record in the above-entitled cause it appears that the verdict of the jury and the judgment was given for the said Fidelity Insurance, Trust & Safe Deposit Company against the said Frank M. Hayes as receiver of the Keystone National Bank of Erie, Pa. Whereas by the law of the land the verdict of the jury and the judgment ought to have been given for the said Frank M.

Hayes as receiver of the Keystone National Bank of Erie, Pa., against the said Fidelity Insurance Trust & Safe Deposit Company in the sum of $17,250 with interest at 6 % per annum from December 3, 1897.

7. That the said court erred in refusing to give to the jury the following instructions (plaintiff's first point) requested by the plaintiff in error at the trial of said cause, the facts set forth therein and if found true by the jury constituting an estoppel in law to the defendant to deny its liability for the collection of the assessment sued on. The said first point being in words as follows, to wit:

"1. If the jury find that in November of 1890 the Delamaters were the owners of 230 shares of the stock of the Keystone National Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their note of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly assigned by them, accompanied by authority in the defendant corporation in case of default in payment of said note, to sell said shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors, that the defendant corporation in January, 1891, caused said shares to be transferred upon the bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment to Hand was not known to or approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent or approval of Delamaters, or of their assignees, the defendant corporation caused Hand to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of directors of said bank and to vote for the reduction of its capital stock; the corporation defendant caused the certificate of 230 shares to be surrendered by the bank at the time its capital stock was reduced from $250,000 to $150,000 and took in lieu thereof, in the name of W. W. Hand, for its benefit, 172½ shares of the stock of said bank; that the said shares have ever since remained on the books of the bank in the name of Hand; that at the several times of issuance to Hand of the certificate for 230 shares and of the issuance to him of the 172½ shares, he executed and delivered to the defendant corporation, which retained the latter until the present time said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that in pursuance of said information the assignees asked and obtained in their account credit for said shares; that before and after the failure of the bank, the corporation defendant in writing informed the officers of the bank that it was the owner of said 172½ shares; that there has been no interference of any sort or kind since January, 1891, by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares; and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15,000 and

no admission by them has been made of any indebtedness thereon, you must find a verdict for the plaintiff."

8. That the said court erred in refusing to give to the jury the following instruction (being plaintiff's second point) requested at the trial of the above-entitled cause by the plaintiff in error. The said second point being in words as follows, to wit:

"2. If the jury find that in November of 1890 the Delamaters were the owners of 230 shares of the stock of the Keystone National Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their notes of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly signed by them, accompanied by authority in the defendant corporation in case of default in payment of said notes, to sell said shares; that in December 1890, the Delamaters failed and made an assignment for the benefit of their creditors; that the defendant corporation in January, 1891, caused said shares to be transferred upon the bank's books for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment to Hand was not known to nor approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent or approval of Delamaters, or of their assignees the defendant corporation caused Hand to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of directors of said bank, and to vote for the reduction of its capital stock; the corporation defendant caused the certificates of 230 shares to be surrendered by the bank at the time its capital stock was reduced from $250,000 to $150,000 and took in lieu thereof, in the name of W. W. Hand, for its benefit 172½ shares, of the stock of said bank; that the said shares have ever since remained on the books of the bank in the name of Hand; that at the several times of issuance to him of the 172½ shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant and upon being there referred to the proper officer thereof were informed that the corporation defendant was the owner of said shares; that in pursuance of said information the assignees asked and obtained in their accounts credit for said shares; that before and after the failure of the bank, the corporation defendant in writing informed the officers of the bank that it was the owner of said 172½ shares; that there has been no interference of any sort or kind since January 1891, by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares, and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15,000 and no admission by them has been made of any indebtedness thereon, you may find that prior to the failure of the bank, there was a conversion by the defendant corporation to its own use of said shares of stock. If you find that there was such conversion, you must find a verdict for the plaintiff."

9. That the said court erred in refusing to give to the jury at the

trial of the above-entitled cause, binding instructions for the plaintiff in error for the amount of his claim (upon the law and evidence), being the third point of charge requested by the plaintiff in words as follows, to wit:

"3. You must find a verdict for the plaintiff for the amount of his claim."

10. That the said court erred in refusing to give to the jury the following instruction (being plaintiff's fourth point) requested at the trial of said cause by the plaintiff in error. The said fourth point being in words as follows, to wit:

"4. If you find there was a deposit with the corporation defendant by the Delamaters of the 230 shares of the bank stock with a blank power to transfer, as collateral security for their note of $15,000 with authority in the defendant corporation in case of default in payment of the note to sell the shares; this did not justify it, before it had made any sale of the shares, after default, to cause the same to be transferred to W. W. Hand, if there was no agreement or consent by Delamaters or their assignees to such transfer."

11. That said court erred in refusing to give to the jury the following instruction (being plaintiff's fifth point) requested at the trial of said cause by the plaintiff in error. The said fifth point being in words as follows, to wit:

"5. If you find that prior to the failure of the bank, the defendant corporation asserted to the assignees and to the bank, that it was the owner of the shares; that the shares were transferred in January, 1891 into the name of Hand without the knowledge, or assent of Delamaters or their assignees; that in 1895, or thereabouts, prior to the failure of the bank, the corporation defendant without the knowledge or assent of Delamaters or their assignees caused proxies to be given by Hand, which were acted upon, to vote upon said shares in the election of directors and for the reduction of its capital; and that 57½ of the shares without such knowledge or assent were surrendered to the bank by the corporation defendant, antecedently to the bank's failure, then you may find a verdict for the plaintiff."

12. That the said court erred in giving the following instruction in its general charge to the jury, namely, that the whole subject is a question of fact and not of law. The contention of the plaintiff in error being that the defendant is estopped by the evidence produced at the trial as a matter of law from denying its liability for the assessment.

13. That the said court erred in giving the following instruction during the course of the charge to the jury at the trial of said cause, to wit: That without the knowledge, consent or ratification of the Delamaters, Delamater & Co. or the assignees of Delamater & Co., said defendant corporation had the implied right, by reason of its holding blank powers to transfer the title of the shares of stock in question, to secretly transfer the same on the books of the bank to the name of its own agent, retaining control thereof in itself and to thereby create without the knowledge, consent or ratification of the

Delamaters or their assignees and without notice to the bank, its own agent a trustee for the Delamaters or their assignees.

14. That the said court erred in giving instruction to the jury at the trial of said cause during the course of the charge to the effect that the only question in the case was one of fact as to whether or not the said defendant was the real owner of the stock as distinguished from its being a pledgee of the stock and that the registering of the stock on the books of the bank by the defendant in the name of its agent releases it from liability for the assessment in case the jury found that it held the same as a pledgee and not as a real owner.

15. That the said court erred in giving the following instruction during the course of the charge to the jury, to wit: "The burden of proof is upon the plaintiff to show, to prove to you by the fair weight of the evidence that the defendant was the real owner of this stock and if you are unable to come to that conclusion, if the evidence is so balanced that you cannot reach that point, if your minds are unable to decide that the defendant was the real owner, then the plaintiff has failed and your verdict must be for the defendant."

16. That the said court erred in instructing the jury during the course of its charge in all that portion thereof in which the court deals with the matter of the right of the defendant to put the stock in the name of Hand.

17. That the said court erred in giving the following instruction to the jury (being defendant's first point) requested by the defendant in error at the trial of said cause. The said defendant's first point being in words as follows, to wit:

"1. A creditor who holds shares in a national bank as collateral security for an indebtendess of the real owner of the shares is not liable as a stockholder for an assessment made upon these shares by the Comptroller of the Currency under the provisions of the national banking act, even though such creditor has caused the shares to be transferred into the name of an employee, in whose name the shares are registered upon the books of the bank at the date of the assessment."

18. That the said court erred in giving the following instruction to the jury (defendant's second point) requested at the trial by the defendant in error. The said second point being in words as follows, to wit:

"2. The circumstance that Mr. Atherton as an officer of the Fidelity Company referred to that company as the 'owner' of these shares in the correspondence had with the officers of the Keystone National Bank of Erie, does not of itself prove that the Fidelity Company was the absolute owner of the shares so as to render that company liable to an assessment as a stockholder, if the jury find from the correspondence between the same parties or other evidence in the case, that the Fidelity Company in fact held the shares registered in the name of W. W. Hand as collateral security for a debt of Delamater & Co."

19. That the said court erred in giving the following instruction

to the jury (being defendant's third point). The said defendant's third point being in words as follows, to wit:

"3. The word 'owner' does not of necessity import absolute ownership—it can properly be used in the reference to the title of one who is a pledgee in possession of personal property. The nature of the ownership is to be determined by all the evidence in the case."

20. That the said court erred in its answer to the defendant's sixth point as an instruction to the jury at the trial that "under all the evidence the verdict must be for the defendant." *That* the said trial judge upon this sixth point of the defendant instructing the jury in answer to said point in words as follows, to wit:

"That point is reserved. I shall put it in this form, 'the court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim.'"

21. That the said court erred in refusing a new trial in said cause, and in holding "that the facts in this case do not differ materially from the facts in Anderson *v.* Philadelphia Warehouse Co. 111 U. S. 479."

Second. The said circuit court of appeals for the third circuit, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the eastern district of Pennsylvania to said circuit court of appeals, erred in making its order on the 29th day of April 1901 affirming the judgment of the said circuit court, and directing the mandate to issue to the said circuit court, directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

Third. That the learned circuit court of appeals for the third circuit erred in not making an order upon the law and evidence of the case reversing the judgment of said circuit court and directing the said circuit court to enter judgment for the plaintiff in error and against the said defendant, The Fidelity Insurance, Trust & Safe Deposit Company, in the sum of seventeen thousand, two hundred and fifty dollars ($17,250) and interest thereon at six per centum (6%) per annum from December 3, 1897, besides the costs, because,

(*a.*) That the evidence in the case equitably estops defendant in error to deny its holding and ownership of the 172½ bank shares within the meaning of sec. 5151 of the Revised Statutes of the United States.

(*b.*) That the evidence in the case equitably estops the defendant in error to deny its liability as a shareholder to the creditors of the bank within the meaning of sec. 5151 of the Revised Statutes of the United States.

(*c.*) That the voluntary act of defendant in error causing a transfer of the bank shares on the books of the bank from Geo. B. Delamater and Geo. W. Delamater to W. W. Hand, its authorized agent to hold the same for its own benefit, concealing said transfer from the Delamaters and their assignees and without their knowledge consent or ratification and without any notice at the time to the bank of pre-existing pledge relations between it and the Delamaters so wronged and prejudiced the creditors of the bank by thus dis

charging the Delamaters from all rights and liabilities as shareholders under sec. 5139 and 5151 of the Revised Statutes of the United States, that defendant in error is equitably estopped to deny its liability as a shareholder to creditors within the meaning of sec. 5151 aforesaid.

(*d.*) That the voluntary act of defendant in error in transferring the bank shares on the books of the bank without consulting the Delamaters or their assignees and without their knowledge, consent or ratification to W. W. Hand, its own authorized agent, thereby discharging the Delamaters from all liability as shareholders to the creditors and the authorized acceptance by its said agent, W. W. Hand, of a certificate therefor in his own name for the purpose only of immediately transferring and assigning said certificate in blank to the defendant in error and the subsequent voting of the shares by said agent by direction of the defendant in error at meetings of the shareholders of the bank and its voluntarily voting the shares for and paying an assessment thereon when the capital of the bank was impaired and the continuous holding by it of the certificate for said shares so assigned in blank, that at any time they could be transferred on the books of the bank into defendant in error's name together with its admission to the bank for the purpose of getting information that shareholders of the bank only would be entitled to receive, that it was the owner and holder of the shares that stood in the name of W. W. Hand and that the shares belonged to it and not to Hand, equitably estops defendant in error, when the bank becomes insolvent, to deny its liability as a shareholder within the meaning of sec. 5151 of the Revised Statutes of the United States.

(*e.*) That the evidence in the case equitably estops defendant in error to deny its conversion of all the rights of a shareholder in said 172½ bank shares from the Delamaters to its own beneficial use and its consequent liability as a shareholder within the meaning of secs. 5139 and 5151 of the Revised Statutes of the United States.

(*f.*) That the defendant in error is equitably estopped from denying notice to it of the insolvency of the Delamaters prior to the transfer by it of the stock on the books of the bank from the Delamaters to its own duly authorized agent, W. W. Hand.

(*g.*) That the evidence in the case equitably estops defendant in error to deny its right to receive dividends upon the 172½ shares if any had been paid by the bank and to vote the shares through its duly authorized agent, W. W. Hand.

(*h.*) That all the evidence in the case equitably estops defendant in error to deny that it was the real and beneficial owner of the 172½ bank shares within the meaning of sec. 5151 U. S. Rev. Stat.

(*i.*) The act of W. W. Hand in accepting the 172½ bank shares and the certificate therefor in his own name and in holding himself out on the books of the bank and on the list of shareholders as a shareholder of the bank was by direction of the defendant in error and he acted entirely within the scope of his authority as its agent in so doing and without the knowledge, consent or ratification of the Delamaters, Delamater & Co. or their assignees and his principal, the defendant in error, is equitably estopped by the authorized acts

of its agent to deny liability as a shareholder within the meaning of sec. 5151 of the Revised Statutes of the United States.

(*k.*) If W. W. Hand were pledgee simply of the 172½ bank shares their transfer to him on the books of the bank, his acceptance of a certificate of ownership in his own name, the entry of his name on the list of shareholders, his voluntary payment of an assessment to make good impaired capital and his voting the shares at meetings of shareholders would equitably estop him to deny liability to creditors as a shareholder under sec. 5151 of the Revised Statutes of the United States; and if defendant in error were pledgee simply and W. W. Hand, within the scope of his authority as its agent and by its direction agreed to and did hold the 172½ bank shares in his own name without personal interest therein and simply as representative and under direction of the defendant in error and without any agreement between defendant in error or Hand and Delamaters or their assignees or with the bank, that the shares be held by Hand as trustee, and without the knowledge, consent or ratification of the Delamaters or their assignees and without notice to the bank of any pledge relation at the time of the transfer to Hand, defendant in error paying assessments to make good impaired capital through its agent and directing him as to voting the shares at the meetings of shareholders and holding the certificate therefor duly assigned in blank so that at any time the shares may be transferred upon the books of the bank to defendant in error's name, the acts of the agent, within the scope of his authority, equitably estop his principal, the defendant in error, to deny its liability to creditors as a shareholder within the meaning of sec. 5151 of the Revised Statutes of the United States just as if the shares stood in its own name.

4. That the circuit court of appeals for the third circuit erred in not sustaining the writ of error then before it and in not reversing the judgment entered in this action in said court.

And said George H. Higgins, as receiver of the Keystone National Bank of Erie, the plaintiff in error prays that the judgment aforesaid entered herein in the circuit court of the United States for the eastern district of Pennsylvania, and the order entered herein as aforesaid by the United States circuit court of appeals for the third circuit and the judgment of affirmance to be entered in said circuit court upon said order of affirmance, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, be reversed, annulled and altogether held for naught, and that the plaintiff in error may be restored to all things which he hath lost by reason of said judgment and order.

ASA W. WATERS,

———, ———,

Attorneys for Plaintiff in Error.

[Endorsed:] No. —. October term 1900. In the Supreme Court of the United States. George H. Higgins as receiver of the Keystone National Bank of Erie, Pennsylvania, plaintiff in error, *vs.* The Fidelity Insurance, Trust and Safe Deposit Company, defendant in error. Assignments of error. Asa W. Waters, John G. Johnson, attorneys pro plaintiff in error.

In the Supreme Court of the United States.

GEORGE H. HIGGINS, as Receiver of the Keystone National Bank of Erie, Pennsylvania, Plaintiff in Error,
vs.
THE FIDELITY INSURANCE, TRUST AND SAFE Deposit Company, Defendant in Error.

No. —. October Term, 1900.

Bond for Costs.

Know all men by these presents, that I George H. Higgins as receiver of the Keystone National Bank of Erie, Pennsylvania, am held and firmly bound unto The Fidelity Insurance, Trust & Safe Deposit Company of Philadelphia, Pa., defendant in error above named, in the sum of five hundred dollars ($500) to be paid to the said The Fidelity Insurance, Trust & Safe Deposit Company, to which payment well and truly to be made, I bind myself as such receiver, my successor or successors, firmly by these presents.

Sealed with my seal and dated the 11th day of September, 1901.

Whereas the above-named plaintiff in error, George H. Higgins as receiver of the Keystone National Bank of Erie, Pa., has sued out a writ of error to the Supreme Court of the United States to review and reverse the judgments in the above-entitled cause by the United States circuit court of appeals for the third circuit and the circuit court of the United States for the eastern district of Pennsylvania.

Now therefore, the condition of this obligation is such that if the above-named George H. Higgins as receiver of the Keystone National Bank of Erie shall prosecute said writ to effect and answer all costs and damages, if he fails to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. H. HIGGINS,
Receiver of the Keystone National Bank of Erie, Pennsylvania.

I hereby agree to the above bond.

—— ——,
Attorney for Defendant in Error.

Approved.
GEO. SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) In the Supreme Court of the United States. October term 1900. No. —. George H. Higgins, as receiver of the Keystone National Bank of Erie, Pennsylvania, plaintiff in error, *vs.* The Fidelity Insurance, Trust and Safe Deposit Company, defendant in error. Bond. Filed October 5, 1901 Wm. H. Merrick clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between George H. Higgins, receiver of the Keystone National Bank of Erie, plaintiff in error, and The Fidelity Insurance, Trust & Safe Deposit Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of October, in the year of our Lord one thousand nine hundred and one.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

To the Fidelity Insurance, Trust & Safe Deposit Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the third circuit, wherein George H. Higgins, receiver of the Keystone National Bank of Erie, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 4th day of October, in the year of our Lord one thousand nine hundred and one.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

I hereby accept service of the within citation for the Fidelity Insurance, Trust and Safe Deposit Company, and request the clerk to enter my appearance for it.

RICHARD C. DALE.

UNITED STATES OF AMERICA, *ss:*

I, William H. Merrick, clerk of the United States circuit court of appeals, for the third circuit, do hereby certify the foregoing pages from one to one hundred and seventy-four inclusive to contain a full, true, complete and faithful copy of the original transcript of record and proceedings in the case of George H. Higgins as receiver of the Keystone National Bank of Erie, plaintiff in error, against The Fidelity Insurance, Trust and Safe Deposit Company, defendant in error, on file and now remaining among the records of said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this nineteenth day of October, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States the one hundred and twenty-sixth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 18,294. U. S. C. C. of appeals, 3rd circuit. Term No. 441. George H. Higgins, receiver of the Keystone National Bank of Erie, plaintiff in error, *vs.* The Fidelity Insurance Trust and Safe Deposit Company. Filed October 21st, 1901.

FILE COPY.

No. 178. October Term, 1902.

Office Supreme Court U.
FILED
FEB 23 1903
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

GEORGE C. RANKIN

(WHO SUCCEEDS GEORGE H. HIGGINS),

Receiver of the Keystone National Bank of Erie, Pennsylvania, Plaintiff in Error,

vs.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Transcript filed October 21, 1901.
(18,294.)

BRIEF OF PLAINTIFF IN ERROR.

ASA W. WATERS,
Of Counsel for Plaintiff in Error.

Allen, Lane & Scott, Pts., Phila.

Supreme Court of the United States.

October Term, 1902. No. 178.

George C. Rankin, Receiver of the Keystone National Bank of Erie, Plaintiff in Error,

vs.

The Fidelity Insurance, Trust and Safe Deposit Company.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

Transcript Filed October 21st, 1901. (18,294.)

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

(Page references in Brief are to Transcript of Record.)

The Keystone National Bank of Erie, Pennsylvania, hereinafter designated as the "Bank," was duly organized under the National Banking Act in 1864, and for about thirty-three years did a banking business in

the city of Erie, Pennsylvania. In 1865 its capital stock was $250,000, divided into 2500 shares of $100 each (page 17), and this capital was continued until December 2d, 1892, when it was reduced to $150,000, divided into 1500 shares of $100 each, and it thereafter so continued. Before the reduction of its capital the Comptroller had given notice, on March 16th, 1892, that its then capital was impaired, and the Bank thereupon made an assessment, under section 5205 of the Revised Statutes of the United States, and section 4, Act of June 30th, 1876, upon its shareholders of twenty-five per cent., or $62,500. This assessment was paid voluntarily by the stockholders. On June 29th, 1897, the Comptroller found the Bank insolvent and closed its doors, and on July 26th, 1897, appointed Frank M. Hayes Receiver (page 17); he resigned, and George H. Higgins was appointed April 17th, 1899, and he resigning, George C. Rankin, on March 31st, 1902, was appointed and is now Receiver.

The Comptroller ordered an assessment, under sections 5151 and 5234, Revised Statutes of the United States, on November 3d, 1897, for $150,000 (one hundred per cent.), payable December 3d, 1897, and directed the Receiver to collect same by suit or otherwise. (Page 18.)

One-ninth of this assessment is in dispute in this action.

On February 1st, 1893, the Bank issued its certificate No. 236, in its usual form, for one hundred and

seventy-two and one-half shares to W. W. Hand. (Page 112.) This certificate was sent to defendant in compliance with following letter :—

"PHILADELPHIA, January 24, 1893.

"*Keystone National Bank of Erie,*

"GENTLEMEN :—Enclosed you will find certificates No. 180, 181, each 100 shares, No. 183, 30 shares of your Bank to be exchanged in accordance with the resolution of stockholders December 2, 1892. You will please return *the new certificates to the above address.* (that of defendant.)

"Very truly yours,

"CHARLES ATHERTON,
"*Treasurer.*"

(Page 32.)

On February 10th, 1893, defendant wrote Bank acknowledging receipt of one hundred and seventy-two and one-half shares (page 32), and on the same day Hand, at request of defendant, executed an assignment and power on the back of the certificate in words as follows :—

"For value received hereby sell, transfer and assign to the shares of stock within mentioned and authorize to make the necessary transfer on the books of the Bank.

"Witness my hand and seal this 10th day of February 1893.

"W. W. HAND. [L. S.]

"Witnessed by
"HARRY J. MOORE."

(Page 112.)

Defendant has continued to hold this certificate so indorsed to the present day.

On November 13th, 1893, defendant wrote to Bank :—

"GENTLEMEN: You will please send us your last statement and any other information in regard to the affairs of your Bank that might interest us.

"Very truly yours,

"CHARLES ATHERTON,

"*Treas'r.*"

(Page 32.)

The following additional letters were received from defendant, by Bank before failure, to wit:—

"PHILADELPHIA, March 20, 1894.

"*Matthew Griswold, President, Keystone National Bank, Erie, Pa.,*

"DEAR SIR: *This Company holds 172½ shares of your Bank registered in the name of W. W. Hand.* We would like you to send us a copy of your last statement and any other information in regard to the business of the Bank, and as to whether there is any sales of stock, and what price. *We would like to sell our holdings if marketable.*

"Yours truly,

"CHAS. ATHERTON,

"*Vice Prest.*"

(Page 32.)

"PHILADELPHIA, April 4, 1894.

"*Mr. Matthew Griswold, Prest. Keystone National Bank, Erie, Pa.*

"DEAR SIR:—You will please answer my letter of March 20th asking for information in regard to the business of your bank. We would like you to send us a copy of your last statement published, also would like to know

if there has been any sales of stock within the last six months, or what price the last was sold at. As we have a loan of $22,000. depending on the value of 172½ shares we desire the above information.

"Very truly yours,

"CHARLES ATHERTON,

"*Vice President.*"

(Page 108.)

Replying to defendant's letters of March 20th and April 4th, 1894, the Bank wrote as follows:—

"ERIE, PA., April 7, 1894.

"*Charles Atherton, Vice President, Philadelphia, Pa.*

"Your favor of March 20th and April 4th addressed to Matthew Griswold President, were delivered to Mr. Griswold's home, and on account of the absence from the city of Mr. Griswold and family were duly delivered at the Bank this morning. Hence reason for delay in replying. The general upsetting of banking business the past year has been rather discouraging in profit earnings, which we regret to say were not large, owing principally to large withdrawals of dep. sits which of course contracted our loaning power. There has been no change of stock since last May. *A small block which brought par. I enclose copy of last statement.*

"Respectfully,

"F. V. KEPLER."

(Page 107.)

Three years after 1894 the following letters were written to Bank by defendant:—

"PHILADELPHIA, March 17, 1897.

"*F. V. Kepler, Esq., Cashier, The Keystone Natl. Bank, Erie, Pa.*

"DEAR SIR:—*This Company owns 172½ shares of the stock of your bank registered in the name of W. W. Hand.* We

would be much obliged for any information you can give us in regard to the business of the bank, and a copy of your last statement to the Comptroller. Do you know of any sales of the stock and at what price sold? We are anxious to sell the stock to close an account. *If you can put us in the way of finding a customer, we will pay the usual commission.*

"Yours truly,

"CHAS. ATHERTON,
"*Vice-President.*"

(Page 33.)

"PHILADELPHIA, March 20, 1897.

"*F. M. Lamb, Esq., Cashier Keystone National Bank, Erie, Pa.*

"DEAR SIR:—This company owns 172½ shares of the stock of your bank registered in the name of W. W. Hand. We would be much obliged for any information you can give us in regard to the business of the bank or a copy of the last statement to the Comptroller. Has there been any sales of stock within the last year, if so at what price. We wish to close the account for which this is collateral. *If you can put us in the way of finding a customer we will pay you the usual commission.*

"Yours truly,

"CHARLES ATHERTON,
"*V. P.*"

(Page 108.)

"PHILADELPHIA, April 8, 1897.

"*F. M. Lamb, Esq., Cashier Keystone National Bank, Erie, Pa.*

"DEAR SIR:—March 17th I addressed a note to Mr. F. V. Kepler supposing he was still cashier of your bank. He said he was not connected with the bank and referred me to you. *On March 20th, I wrote you, this company owns 172½ shares of the stock of your bank registered in*

the name of W. W. Hand. Since we have held the stock we paid an assessment and the number of shares reduced. We have no knowledge of the bank affairs. We would like to have the last statement to the Comptroller and any other information in regard to the business of the bank you will give us. Are there any market for the stock and at what price? We are anxious to sell this stock to close an account. If you can put us in the way of selling the stock *we will pay a commission.*

"Yours truly,

"CHARLES ATHERTON,
"*V. P.*"

(Page 108.)

Replying to the last three letters the Bank wrote:—

"ERIE, PA., April 14, 1897.

"*Charles Atherton, Esq., V. P., Phila., Pa.*

"Enclosed find report of this bank March 9th, 1897. As regards sale of the stock, I think there would be a poor chance at the present time. Since our trouble of several years ago we have made no dividends, the condition of business being such that it has not been advisable to do so. Business is picking up in this locality. Should it continue we would get our share of it and be able to make dividends. Now, then will be a chance for a sale of stock. I will keep this matter in mind and should I find a chance for a sale will let you know. I have been out of the city, thus the delay in answering yours of 8th.

"Respectfully yours,

"F. M. LAMB,
"*Cashier.*"

(Page 107.)

All these letters bear date more than two months prior to Bank's failure. Defendant wrote another

nearly two months after the Receiver's appointment and about three weeks before the assessment of November 3d, 1897, as follows:—

"PHILADELPHIA, October 14, 1897.

"*F. M. Lamb, Esq., Cashier Keystone N. Bk., Erie, Pa.*

"DEAR SIR:—I saw a report in one of the newspapers that your bank was going into voluntary liquidation. You will please inform us whether the report is true, and if so will there be any value in the stock. *The stock in the name of W. W. Hand belongs to this company.* Please give us such information as you can.

"Very truly,

"CHAS. ATHERTON,
"*Vice President.*"

(Page 33.)

Thus Receiver, Comptroller, and Bank were advised by defendant that the stock standing in the name of W. W. Hand belonged to it and not to Hand, and pursuant to these advices the Bank's cashier had written above the name "W. W. Hand," in his account in the stock ledger (months before the Bank's failure) the name "The Fidelity Trust & Safe Deposit Co., Phila., Pa.," as owner of one hundred and seventy-two and one-half shares. The Receiver finding this situation, under direction of Comptroller, demanded payment of the $17,250 assessment upon these shares from defendant. (Pages 19–109.)

The officers of the Bank understood the defendant to be the owner of the stock and acted accordingly. (Page 61.) The stock ledger showing the name

"Fidelity Trust & Safe Deposit Co., Phila., Pa.," written over that of Hand (pages 20, 49, 59), together with the stock certificate book, showing transfer to Hand and its transmission of certificates to defendant, and the foregoing letters claiming ownership, were open to the inspection of creditors and shareholders of the Bank for a long time prior to its failure. (Pages 36, 37, 39, 40, 50, 55, 61.) It was from these books that the list of shareholders was made up, as required by section 5210, Revised Statutes United States. (Pages 25, 47, 56.) The last report to the Comptroller, giving a copy of the list of shareholders, verified by the oath of the president or cashier of the Bank, was presumably made as required by law on the first Monday of July, 1896, nearly one year prior to the failure.

The evidence of writing name of defendant above that of W. W. Hand on the books as a fact to establish an estoppel to deny ownership of the shares to creditors by defendant was excluded by the trial court and not permitted to go to the jury and is the first assignment of error.

In plaintiff's statement, under the Pennsylvania practice, filed March 21st, 1899 (page 8), it is alleged, as ground of estoppel, that said

> "The Keystone National Bank of Erie recognized no other owner of said shares of stock than said defendant and represented to its creditors, whenever an occasion presented, that said defendant was the real owner of said

one hundred and seventy-two and one-half shares of its capital stock, and that the said W. W. Hand stood only as agent for said defendant in the holding of the same, and plaintiff says that credit was given said banking association on account of said ownership of said stock and contracts, debts and engagements, owing to its creditors, which the assets and credits of said banking association are wholly insufficient to pay and discharge, were created upon the liability of said defendant as a stockholder of said banking association, as provided by sections 5151 and 5234 of the Revised Statutes United States."

This certificate, No. 236, for one hundred and seventy-two and one-half shares (page 112), never passed to the custody of W. W. Hand; it was forwarded by Bank direct to defendant and immediately, at its request, assigned over and delivered to and held by defendant to present time, and in such manner that at any time it could be transferred to its own name. Hand never had any interest whatsoever in the shares. He was, in the holding, simply agent of defendant.

The statement made heretofore presents, it is urged by plaintiff in error, the substantial facts which govern this case, but it is necessary, in order to have a complete appreciation of the claim of the Receiver and of the defense made by the defendant in error, to begin a history of these one hundred and seventy-two and one-half shares four years prior to the issue to W. W. Hand of certificate No. 236. (Page 112.)

On March 1st, 1889, Delamater & Co., a banking

firm of Meadville, Pa., borrowed of defendant $15,000, and pledged as collateral security two hundred and thirty shares of the Bank.

The shares were valued at the time at par ($23,000) and the bank was in good credit, and for twenty-seven years had regularly paid and was then paying semi-annual dividends. The note was the usual collateral note with power to sell upon default in payment at maturity. It was signed by Delamater & Co., and the two hundred and thirty shares belonged to that firm, although standing in individual names of its members. George B. Delamater had one hundred shares issued March 1st, 1865 (Certificate No. 21), and thirty shares issued April 6th, 1871 (Certificate No. 57), and George W. Delamater one hundred shares issued February 4th, 1889. (Certificates Nos. 168-169 of fifty shares each.) Delamater & Co., with the certificates, and at the same time also delivered to defendant assignments and powers of attorney authorizing it to transfer the shares on the books of the Bank executed in blank as to the name of transferee, and bearing date on or before that of delivery. (Pages 37, 38, 39, 40, 77, 79, 80, 90, 91, 92, and 93.)

This note of Delamater & Co., of March 1st, 1889 (page 10), was not paid at maturity, and from time to time renewal notes were given upon payment of interest by Delamater & Co. for a period of nearly two years; the last renewal note bore date November 15th, 1890, and was payable sixty days

after its date and it matured, with grace, on January 17th, 1891. During the renewal period the two hundred and thirty shares remained in the name of George B. and George W. Delamater on the books of the Bank and the Delamaters voted the shares and exercised all the rights of shareholders and were paid by Bank all dividends, and defendant during this period exercised no right of ownership in the shares, made no use whatever of the blank assignments and powers, but held them just as they were delivered by Delamater & Co., and defendant gave no notice of any kind to the Bank that the shares had been pledged to it by the Delamaters, nor at any time was any notice given to Bank by the Delamaters, Delamater & Co., or their assignees, of a pledge of the shares.

On December 5th, 1890 (twenty days after Delamater & Co. gave this last renewal note), that firm failed and executed a general deed of assignment for the benefit of their creditors, under insolvent laws of Pennsylvania, to George W. Haskins and John O. McClintock, of Meadville, Pa. (Pages 110, 111.) Notice of this assignment was at once brought to defendant, for we find on December 17th, 1890, it addressed a letter to "Delamater & Co., or their Assignees," as follows:—

"PHILADELPHIA, December 17th, 1890.

"*Messrs. Delamater & Co., or their Assignees, Meadville, Pa.*

"GENTLEMEN:—We hold a note of Delamater & Co., dated November 15th, 1890, due in sixty days, secured by

230 shares of Keystone National Bank of Erie, and have to notify you that the same cannot be renewed. If you are prepared to anticipate the payment and have the collateral returned we will be glad to arrange it. The note bears interest at 6% from date.

"Yours respectfully,

"R. PATTERSON,
"*V.-P.*"

(Page 93.)

It seems that the assets of the assigned estate of Delamater & Co. were insufficient to anticipate the payment of the note, and release the collateral.

On January 3d, 1891, the appraisers appointed by the Court of Common Pleas of Crawford Co., Pennsylvania, in the insolvent proceedings, completed the inventory and appraisement of that assigned estate, and the assignees of Delamater & Co. were charged with $8000 as equity in the two hundred and thirty shares, being the difference between the appraisement of the stock, $23,000, and the loan of $15,000 by the defendant. (Page 64.)

With full notice of all these proceedings at Meadville, Pa., defendant, without the knowledge, consent or ratification of the Delamaters, Delamater & Co., or their assignees, suddenly, on January 10th, 1891 (one week before the maturity of the note), by the hand of its then treasurer, Charles Atherton, filled into the blank assignments and powers of attorney (delivered to it nearly two years before by Delamater & Co.) the name "W. W. Hand" (a clerk in its employ since

1879) (page 30), and enclosed the certificates, assignments, and powers, so by it filled in to the Bank with the following letter:—

"THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
"COMPANY,
"325–331 Chestnut Street,
"PHILADELPHIA, January 10, 1891.

"*Keystone National Bank of Erie, Penna.*

"GENTLEMEN:—We enclose herewith certificates for two hundred and thirty shares capital stock of your bank which we wish transferred to W. W. Hand, viz.:

"Certificate No.	57,	Regd.	Geo. B. Delamater	30 shares
" "	21,	"	do.	100 shares
" "	168,	"	Geo. W. Delamater	50 shares
" "	167,	"	do.	50 shares
				230

"You will please return to us certificates two one hundred shares each, one thirty shs.

"Yours truly,

"CHAS. ATHERTON,
"*Treas'r.*"

(Pages 31, 34, 35.)

Three days later, on January 13th, 1891, the Bank paid a semi-annual dividend of two per cent. ($460 on two hundred and thirty shares). (Page 51.) It does not appear from the record that either the defendant or the Delamaters were paid this dividend, which proved to be the last dividend paid by the Bank. It accounts, however, for the sudden move of the de-

fendant to have the shares transferred a week before maturity of the note.

It does not appear from the evidence that defendant had any fear of the responsibility to creditors of holding the shares in its own name, nor that W. W. Hand was then or is now financially irresponsible.

It appears clearly in the record that W. W. Hand was without any interest whatsoever in the shares, never owned them (page 25), nor had them in his custody (page 26), nor did he have any interest in the loan (Page 30.)

The defendant forwarded the shares for transfer to Bank and received them when transferred from Bank; W. W. Hand, at its request, executed assignments and powers of attorney to and the shares were always in the custody of defendant. He was simply agent of defendant for holding the shares; but at no time did he notify Bank that the shares had been pledged by Delamater & Co. to defendant. His agency in holding the shares was disclosed to Bank by defendant.

The defendant, impatient because of delay in hearing from Bank, wrote to it as follows:—

"THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
"CO.,

"325–331 Chestnut St.

"(the officers of the company being named).

"PHILA'A, JANUARY 17, 1891.

"*Keystone National Bank, Erie, Pa.*

"GENTLEMEN:—We mailed you per registered letter on the 10th inst. 230 shares of stock of your bank for

transfer. We have no acknowledgement. Was it received?

"Yours truly,

"CHARLES ATHERTON,

"*Treasurer.*"

(Page 41.)

On January 17th, 1891, the Bank mailed certificates for two hundred and thirty shares, as requested, to defendant, and on January 19th, 1891, defendant acknowledged receipt as follows:—

"THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT "CO.,

"(the officers and address being named).

"PHILA'A, Jan. 19, 1891.

"*Keystone National, Bank Erie, Pa.*

"GENTLEMEN:—Your favor of the 17th inst. received enclosing certificates for 230 shares of stock of the bank registered in the name of W. W. Hand. *We would like to have a bid for the stock if you know of a purchaser.*

"Yours truly,

"CHARLES ATHERTON,

"*Treasurer.*"

(Page 42).

The Delamater certificates (Nos. 21, 57, 168, 169), assignments, and powers surrendered by defendant to Bank on January 10th, 1891, and the certificates for the two hundred and thirty shares in the name of W. W. Hand returned to defendant (Nos. 180, 181, and 183), were in form the same as certificate No. 236, and the assignment and power of attorney indorsed thereon. (Page 112.)

The Bank, upon receipt of the Delamater certificates and instructions in defendant's letter of January 10th, 1891, opened an account in the name of W. W. Hand in its stock ledger, and transferred two hundred and thirty shares from George B. Delamater and George W. Delamater (one hundred and thirty from the former and one hundred from the latter) to him, and duly canceled the certificates, Nos. 21, 57, 168, 169, which had been surrendered to it by defendant, and issued new certificates, Nos. 180, 181, and 183, for the shares in the name of W. W. Hand, bearing date January 15th, 1891, which, it will be noted, was two days before the maturity of Delamater & Co.'s note. The Bank sent these certificates to defendant on January 17th, 1891, and F. V. Kepler, assistant cashier, wrote on the stubs in the Bank's stock-certificate book: "Sent to Fidelity Insurance, Trust and Safe Deposit Co., Phila, Pa., 1-17-91" (pages 34 and 42), and on January 19th, 1891, defendant acknowledged receipt of the shares. (Pages 31 and 42.)

There was no notice of any kind to or knowledge, consent, or ratification by the Delamaters, Delamater & Co., or their assignees at this time or at any time thereafter of this transfer by defendant to W. W. Hand. Neither the Delamaters nor their assignees had any official connection with the Bank, and all of them resided in a city many miles distant from Erie, Pa., and at no time were in communication with the Bank.

The ownership of the shares had passed by the blank assignments and powers, *first*, from George B. and George W. Delamater to Delamater & Co. (this was prior to March 1st, 1889); *second*, on March 1st 1889, from Delamater & Co. to defendant, and on December 5th, 1890, from Delamater & Co. by general deed to assignees (pages 110, 111); thus, every interest in the shares, contingent or otherwise, had completely passed from George B. and George W. Delamater before March 1st, 1889, and from Delamater & Co. on December 5th, 1890. On March 16th, 1892, the Comptroller (under section 5205, Revised Statutes) had given notice to Bank that owing to impairment of its capital an assessment of twenty-five per cent. was necessary to be made upon its shareholders. (Page 17.) Pursuant to this notice, on September 5th, 1892, the directors of the Bank passed the following resolution :—

> "*Resolved*, That the assessment ordered by the Comptroller of the Currency be assessed, notice given, and payment ordered within ten days from this date."

(Page 53.)

On September 16th, 1892, the Bank received the check of the defendant for twenty-five per cent. on the two hundred and thirty shares, $5750, inclosed in a letter signed "W. W. Hand" (page 54), as follows :—

"PHILA'A, September 16, 1892.

"*Mr. J. I. Towne, Cashier Keystone National Bank, Erie, Pa.*

"Replying to your letter of the 7th, calling for assess-

ment of 25 per cent. on 230 shares of stock in your bank, *standing in my name*, I herewith enclose check for the amount payable $5750. and will thank you to return the proper receipt. You will further oblige by stating whether any progress *has been made towards cancelling the $50,000. shares of your stock held by you, or if any further reduction of the capital stock.*

"Yours Repectfully,

"W. W. HAND."

The $5750 thus paid was credited to the stock ledger account of Hand. (Pages 20, 53, 54.) This payment is admitted to have been made by defendant. The letter itself must have been dictated by Mr. Atherton, then treasurer, and is intrinsic evidence of Hand's simple agency for the defendant in holding the shares.

Afterwards, on December 2d, 1892, at a meeting of the stockholders of the Bank, the following questions were voted upon :—

"*First.*—As to a reduction of $50,000 by the cancellation of that amount of stock of the Bank held by it as collateral security for loans made, the payment of which both principal and interest has been defaulted.

"*Second.*—The further *pro rata* reduction of the capital stock of the Bank twenty-five per cent. of the reduced capital, leaving the capital stock of the Bank $150,000."

W. W. Hand voted by proxy the two hundred and thirty shares in the affirmative of both these propositions (pages 52, 53), and on January 10th, 1893, at a stockholders' meeting of the Bank, he voted the shares by proxy. (Page 52.) These votes of Hand's

were at the instance of defendant and under its direction, and on January 24th, 1893, the Bank received from defendant the following letter, as before stated:

"PHILA'A, Jan. 24, 1893.

"*Keystone National Bank, of Erie, Pa.*

"GENTLEMEN:—Inclosed you will find certificates 180 and 181, each for 100 shares; No. 183, 30 shares, of your Bank, *to be exchanged in accordance with resolutions of stockholders, December 2, 1892. You will please return the new certificates to this address.*

"Very truly yours,

"CHARLES ATHERTON,

"*Treasurer.*"

And, in obedience to this last letter, as heretofore stated, certificate No. 236, for one hundred and seventy-two and one-half shares, involved in this case, was issued, and the stub of the bank's stock certificate book shows that it was sent by registered mail February 7th, 1893, to defendant (page 43), and receipt thereof was acknowledged in the following letter, before quoted:—

"PHILADELPHIA, February 10, 1893.

"*F. V. Kepler, Cashier Keystone, National Bank, Erie, Pa.*

"DEAR SIR:—Yours of the 7th received, with certificate for 172½ shares new stock of your bank.

"Very truly yours,

"CHARLES ATHERTON,

"*Treasurer.*"

On May 1st, 1895 (more than two years before failure of Bank), the assignees of Delamater & Co. called

at the office of defendant to make some adjustment of the supposed equity in the shares, for their final accounting of the assigned estate to the court, and they were then, for the first time, much to their surprise, informed by defendant that an assessment of $5750 had been paid, and the number of shares reduced from two hundred and thirty to one hundred and seventy-two and one-half, and that the remaining shares were not of sufficient value to pay the claim, and that they belonged to defendant. (Pages 65, 66, 67, 80, 81, 82, 83, 84.)

On July 13th, 1896 (more than five years after failure of Delamater & Co.), the assignees filed their final account with the Court of Common Pleas of Crawford County, Pennsylvania, and in it they are credited with $8,000, charged against them in their first account as the equity in the two hundred and thirty shares, it being therein stated, as reason for asking the credit, "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged" (pages 69, 70, 82, 83), and this credit, with the explanation given in the final account, was asked by the assignees, because of the representations made to them by defendant on May 1st, 1895. (Page 83.) This final account, as filed, was confirmed by the court (page 69) on the first Monday of August, 1896 (a year before Bank's failure).

The above entry of the assignees in their final account was excluded by the trial court and not permitted to go as evidence to the jury, and plaintiff's exceptions to that ruling are found in assignments of error, Nos. 3, 4. (Pages 150, 151.)

The total distribution from the proceeds of the assigned estate of Delamater & Co. was less than six per cent, of the face value of the claims proven against it. (Page 73.)

It has been stipulated by all parties hereto that any further printing of exhibits than that contained in the bill of exceptions is waived. (Page 38.)

Since the maturity of the note on January 17th, 1891, there has at no time been a demand of payment made upon the individual members of the firm of Delamater & Co. by defendant, and all rights of action against them were barred in six years thereafter, on January 17th, 1897, under the laws of Pennsylvania (five months before failure of Bank).

Plaintiff in error claims :—

First.—That the trial court erred in excluding from the jury the evidence that defendant upon its notice that it owned the shares had been entered upon the books of the Bank, before its failure, as a stockholder, by the Bank's cashier. This tended to establish the estoppel.

Second.—That the trial court erred in excluding from the jury the evidence contained in the final ac-

count filed by the assignees of Delamater & Co., corroborative of their individual recollection as to the representations of ownership made by them on May 1st, 1895, and their consequent abandonment of every interest of the assigned estate. This tended to establish the estoppel.

Third.—That upon all the evidence in the case defendant in error is estopped to deny that it is a shareholder of one hundred and seventy-two and one-half shares, and responsible to creditors for the contracts, debts, and engagements of the Bank, and that binding instructions should have been given the jury in plaintiff in error's behalf.

Fourth.—That defendant in error is in truth the real owner of the shares, and for this reason binding instructions should have been given to the jury in plaintiff in error's behalf.

ASSIGNMENT OF ERRORS.

(See pages 149 to 158, inclusive, of transcript.)

First.—The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said Circuit Court of Appeals, to wit :—

1. That said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause an entry in the stock ledger of said Bank over the name of W. W. Hand, in an account opened with the said W. W. Hand at the request of the defendant corporation, showing the holding and ownership of one hundred and seventy-two and one-half shares of the stock of said Bank, being the stock in issue in this case, and for the collection of the assessment ordered by the Comptroller of the Currency, upon which the defendant is sued, the said stock ledger having first been admitted in evidence, the witness (Higgins), while testifying to the entries in said book, was about to state that, written over the name of W. W. Hand, in the stock ledger of the Bank, in the handwriting of its cashier, were the words, "The Fidelity Trust and Safe Deposit Company, Philadelphia, Pa." ; that the entry there had been made in the regular course of business and at the time the certificates, at the instance of the defendant, were issued in the name of W. W. Hand, pursuant to written instructions from the defendant corporation to the Bank, that it was the

owner of the stock standing in the name of W. W. Hand, and intended to follow the same up by showing that this book for many years, with this entry of the name of the defendant corporation written over that of W. W. Hand, together with letters from the defendant corporation stating that it was the owner of the stock, had been open to the inspection of the shareholders and creditors of the Bank before its failure, and that the entry was made by the officer of the Bank for the purpose of advising the shareholders and creditors of the Bank of the information they had that the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia was the real or beneficial owner of the stock which stood in the name of its agent. W. W. Hand.

2. That the said court erred in overruling the objection of counsel for plaintiff in error to the introduction in evidence at the trial of said cause, by the witness W. W. Hand, who was permitted to testify that the original loan was made by the defendant corporation to Delamater & Co. on November 15th, 1890. The witness having previously testified that he had no personal knowledge of the matter; that he never came in contact with the Delamaters; that his only information was obtained from the officer of the Fidelity Company, and that his business was simply that of clerk to make entries on its books, and that he had no personal recollection upon the subject; the witness also having testified that the note dated November

15th, 1890, was a renewal. It was also objected by counsel that witness was permitted to testify that the signatures to the obligation was that of Delamater & Co. without having seen any one sign the note, and without having any personal contact with Delamater & Co., or any member of its firm, or any personal recollection of the matter.

3. That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause the following testimony contained in the deposition of John O. McClintock, a witness produced upon behalf of the plaintiff, and one of the assignees for the benefit of creditors in the deed of assignment made by Delamater & Co.:—

"Q. Did you make a further account in the matter of the assignment of Delamater & Co. as assignees? If so, state when and what, if anything, was said, to the best of your recollection, in that account in regard to the charge made against you on account of the two hundred and thirty shares of stock of the Keystone National Bank, heretofore referred to in this deposition.

"A. On the 13th of July, 1896, we, the assignees of Delamater & Co., filed in the above-mentioned case our final account. In this final account we were charged with this item referred to in the question, as follows: 'Equities in stocks and bonds pledged as collateral on loans unadjusted, as follows: (*a*) $23,000 stock of the Keystone National Bank of Erie pledged for the

loan of $15,000 appraised at $8000,' and we were credited with item No. 48, as follows: 'Accountants claim credit for loan of $15,000 charged at $8000.'" (The trial court admitted the testimony to this point, excluding what follows.) "Said stock having been converted by the holder of the note, and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged."

"Q. Was this credit in your second and final account allowed by an order of the court?

"A. It was. The account as filed was finally confirmed by the court.

"Q. Will you state when and where it was recorded?

"A. It was finally confirmed and allowed on the first Monday of August, 1896, and is recorded in the Account Book No. 1, at page 539 of records of the Court of Common Pleas of Crawford County, Pennsylvania.

"Q. This final account of yours, as assignees of Delamater & Co., was filed, then, more than one year after your meeting with the defendant company on or about the first of May, 1895? What connection, if any, had that meeting with your statement in your account with reference to this account?

"A. In relation to this equity?

"Q. Yes.

"A. The statement made by us in our claim of

credit for this item of $8000 was made from the information obtained by us in our interview with the officer of the defendant company on or about the first of May, 1895."

4. That the said court erred in refusing to permit counsel for the plaintiff in error to introduce at the trial the following testimony in the deposition of George W. Haskins, one of the co-assignees for the benefit of creditors of Delamater & Co. and a witness produced upon behalf of creditors of plaintiff in error as follows, to wit:—

"Q. I hand you the final and last account that you filed in that assigned estate, and ask you to look at item No. 48 and refresh your memory in regard to it, and state the matter therein set forth?

"A. In our final account item No. 48 the accountants claim credit for the item of $23,000 Keystone National Bank of Erie stock pledged for the loan of $15,000 charged at $8000." (The trial judge admitted this much of the answer, but refused to admit what follows in this answer and the following answers here quoted.) "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged." This final account was allowed and approved by the Court of Common Pleas, of Crawford County, Pennsylvania, in the matter of the assignment of Delamater & Co. entered to No. 52 February term, 1891.

"Q. When was the account finally confirmed?

"A. On the first Monday of August, 1896."

5. That the agreements as to facts and the matters therein contained and the evidence produced at the trial of the above-entitled cause are not sufficient in law for the said defendant to have or maintain its aforesaid judgment against the said plaintiff in error; the said defendant thereby being estopped to deny its liability for the assessment levied by the Comptroller of the Currency of one hundred per cent. upon the one hundred and seventy-two and one-half shares of the capital stock of said Keystone National Bank of Erie with interest thereon at six per cent. per annum from the day the same was made payable, December 3d, 1897.

6. That by the record of the above-entitled cause it appears that the verdict of the jury and the judgment was given for the said Fidelity Insurance, Trust and Safe Deposit Company against the said Frank M. Hayes as Receiver of the Keystone National Bank of Erie, Pa. Whereas, by the law of the land the verdict of the jury and the judgment ought to have been given for the said Frank M. Hayes as Receiver of the Keystone National Bank of Erie, Pa., against the said Fidelity Insurance, Trust and Safe Deposit Company in the sum of $17,250 with interest at six per cent. per annum from December 3d, 1897.

7. That the said court erred in refusing to give to the jury the following instructions (plaintiff's first

point) requested by the plaintiff in error at the trial of said cause, the facts set forth therein, and if found true by the jury constituting an estoppel in law to the defendant to deny its liability for the collection of the assessment sued on. The said first point being in words as follows, to wit:—

"1. If the jury find that in November of 1890 the Delamaters were the owners of two hundred and thirty shares of the stock of the Keystone National Bank of Erie; that, being such owners at said time, they pledged such shares as collateral security for their note of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly assigned by them, accompanied by authority in the defendant corporation in case of default in payment of said note, to sell said shares; that in December, 1890, the Delamaters failed, and made an assignment for the benefit of their creditors; that the defendant corporation, in January, 1891, caused said shares to be transferred upon the bank's books, for its benefit, with its assent, into the name of its clerk, W. W. Hand; the said assignment to Hand was not known to or approved of, by Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent, or approval of Delamaters, or of their assignees, the defendant corporation caused Hand to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of directors of said Bank, and to vote for

the reduction of its capital stock; the corporation defendant caused the certificate of two hundred and thirty shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000, and took in lieu thereof, in the name of W. W. Hand, for its benefit, one hundred and seventy-two and one-half shares of the stock of said Bank; that the said shares have ever since remained on the books of the Bank in the name of Hand; that at the several times of issuance to Hand of the certificate for two hundred and thirty shares, and of the issuance to him of the one hundred and seventy-two and one-half shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant, and, upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that, in pursuance of said information, the assignees asked and obtained in their account credit for shares; that, before and after the failure of the Bank, the corporation defendant, in writing, informed the officers of the Bank that it was the owner of said one hundred and seventy-two and one-half shares; that there has been no interference of any sort or kind since January, 1891, by the Delamaters or their assignees with the corporation defendant in the possession and use of said shares; and that no de-

mand has been made upon Delamaters since 1891 for the payment of their note for $15,000, and no admission by them has been made of any indebtedness thereon, you must find a verdict for the plaintiff."

8. That the said court erred in refusing to give to the jury the following instruction (being plaintiff's second point) requested at the trial of the above-entitled cause by the plaintiff in error. The said second point being in words as follows, to wit:—

"2. If the jury find that in November of 1890 the Delamaters were the owners of two hundred and thirty shares of stock of the Keystone National Bank of Erie; that being such owners at said time, they pledged said shares as collateral security for their notes of $15,000 with the defendant corporation and delivered the shares of stock, with blank powers on the back, to transfer, duly signed by them, accompanied by authority in the defendant corporation, in case of default in payment of said notes, to sell said shares; that in December, 1890, the Delamaters failed and made an assignment for the benefit of their creditors; that the defendant corporation, in January, 1891, caused said shares to be transferred upon the Bank's books for its benefit, with its assent, into the name of its clerk, W. W. Hand; that said assignment was not known to, nor approved of by, Delamaters or their assignees; that subsequently, anterior to the year 1895, without the knowledge, assent, or approval of Delamaters or of their assignees, the defendant corporation caused Hand

to give powers of attorney, which were acted upon, authorizing proxies to vote for the election of directors of said bank and to vote for the reduction of its capital stock, the corporation defendant caused the certificates of two hundred and thirty shares to be surrendered by the Bank at the time its capital stock was reduced from $250,000 to $150,000, and took in lieu thereof, in the name of W. W. Hand, for its benefit, one hundred and seventy-two and one-half shares of the stock of said bank; that the said shares have ever since remained on the books of the Bank in the name of W. W. Hand; that at the several times of issuance to him of the one hundred and seventy-two and one-half shares, he executed and delivered to the defendant corporation, which retained the latter until the present time, said certificates, with blank powers to transfer the same; that in 1895 the assignees of Delamaters called at the office of the corporation defendant and, upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares; that, in pursuance of said information, the assignees asked and obtained in their accounts credit for said shares; that before and after the failure of the Bank, the corporation defendant in writing informed the officers of the Bank that it was the owner of said one hundred and seventy-two and one-half shares; that there has been no interference of any sort or kind, since January, 1891, by the Delamaters or their assignees with the corporation defendant in the

possession and use of said shares; and that no demand has been made upon Delamaters since 1891 for the payment of their note for $15,000, and no admission by them has been made of any indebtedness thereon, you may find that prior to the failure of the Bank, there was a conversion by the defendant corporation to its own use of said shares of stock. If you find there was such conversion, you must find a verdict for the plaintiff."

9. That the said court erred in refusing to give to the jury at the trial of the above-entitled cause binding instructions for the plaintiff in error for the amount of his claim (upon the law and evidence), being the third point of charge requested by the plaintiff in words as follows, to wit:—

"3. You must find a verdict for the plaintiff for the amount of his claim."

10. That the said court erred in refusing to give to the jury the following instructions (being plaintiff's fourth point), requested at the trial of said cause by the plaintiff in error. The said fourth point being in words as follows, to wit:—

"4. If you find there was a deposit with the corporation defendant by the Delamaters of the two hundred and thirty shares of the bank stock with a blank power to transfer, as collateral security for their note of $15,000, with authority in the defendant corporation in case of default in payment of the note to sell the shares; this did not justify it, before it had made any

sale of the shares, after default, to cause the same to be transferred to W. W. Hand, if there was no agreement or consent by Delamaters or their assignees to such transfer."

11. That said court erred in refusing to give to the jury the following instructions (being plaintiff's fifth point), requested at the trial of said cause by the plaintiff in error. The said fifth point being in words as follows:—

"5. If you find that, prior to the failure of the Bank, defendant corporation asserted to the assignees and to the Bank that it was the owner of the shares; that the shares were transferred in January, 1891, into the name of Hand without the knowledge or assent of Delamaters or their assignees; that in 1895, or thereabouts, prior to the failure of the Bank, the corporation defendant, without the knowledge or assent of Delamaters or their assignees, caused proxies to be given by Hand, which were acted upon, to vote upon said shares in the election of directors and for the reduction of its capital; and that fifty-seven and one-half shares, without such knowledge or assent, were surrendered to the Bank by the corporation defendant, antecedently to the Bank's failure, then you may find a verdict for the plaintiff."

12. That the said court erred in giving the following instruction in its general charge to the jury, namely, that the whole subject is a question of fact and not of law. The contention of the plaintiff in error being

that the defendant is estopped by the evidence produced at the trial as a matter of law from denying its liability for the assessment.

13. That said court erred in giving the following instructions during the course of the charge to the jury at the trial of said cause, to wit, that without the knowledge, consent, or ratification of the Delamaters, Delamater & Co. or the assignees of Delamater & Co., said defendant corporation had the implied right, by reason of its holding blank powers to transfer the title of the shares of stock in question, to secretly transfer the same on the books of the Bank to the name of its own agent, retaining control thereof in itself, and to thereby create without the knowledge, consent, or ratification of the Delamaters or their assignees and without notice to the Bank, its own agent, a trustee for the Delamaters or their assignees.

14. That the said court erred in giving instruction to the jury at the trial of said cause during the course of the charge to the effect that the only question in the case was one of fact as to whether or not the said defendant was the real owner of the shares as distinguished from its being a pledgee of the stock, and that the registering of the stock on the books of the Bank by the defendant in the name of its agent, releases it from liability for the assessment in case the jury found that it held the same as pledgee and not as a real owner.

15. That the said court erred in giving the following

instruction during the course of the charge to the jury, to wit: "The burden of proof is upon the plaintiff to show, to prove to you by the fair weight of the evidence that the defendant was the real owner of this stock, and if you are unable to come to this conclusion, if the evidence is so balanced that you cannot reach that point, if your minds are unable to decide that the defendant was the real owner, then the plaintiff had failed, and your verdict must be for the defendant."

16. That the said court erred in instructing the jury during the course of its charge in all that portion thereof in which the court deals with the matter of the right of the defendant to put the stock in the name of Hand.

17. That the said court erred in giving the following instruction to the jury (being defendant's first point) requested by the defendant in error at the trial of said cause. The said defendant's first point being in words as follows, to wit:—

"1. A creditor who holds shares in a national bank as collateral security for an indebtedness of the real owner of the shares is not liable as a stockholder for an assessment made upon these shares by the Comptroller of the Currency under the provisions of the National Banking Act, even though such creditor has caused the shares to be transferred into the name of an employee, in whose name the shares are registered upon the books of the Bank at the date of the assessment."

18. That the said court erred in giving the following instruction to the jury (defendant's second point), requested at the trial by the defendant in error. The said second point being in words as follows :—

"2. The circumstance that Mr. Atherton, as an officer of the Fidelity Company, referred to that company as the owner of these shares in the correspondence had with the officers of the Keystone National Bank of Erie, does not of itself prove that the Fidelity Company was the absolute owner of the shares so as to render that company liable to an assessment as a stockholder, if the jury find from the correspondence between the same parties or other evidence in the case that the Fidelity Company in fact held the shares registered in the name of W. W. Hand as collateral security for a debt of Delamater & Company."

19. That the said court erred in giving the following instructions to the jury (being defendant's third point). The said defendant's third point being in words as follows, to wit:—

"3. The word 'owner' does not of necessity import absolute ownership—it can properly be used in reference to the title of one who is a pledgee in possession of personal property. The nature of the ownership is to be determined by all the evidence in the case."

20. That the said court erred in its answer to the defendant's sixth point as an instruction to the jury at the trial that "under all the evidence the verdict must

be for the defendant." That the said trial judge upon this sixth point of the defendant instructed the jury in answer to said point in words as follows, to wit:—

"That point is reserved. I shall put it in this form, 'the court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim.'"

21. That the said court erred in refusing a new trial in said cause, and in holding "that the facts in this case do not differ materially from the facts in **Anderson vs. Philadelphia Warehouse Co.**, 111 U. S., 479."

Second.—The said Circuit Court of Appeals for the Third Circuit, before which was heard the writ of error which brought up the record in this action from the Circuit Court of the United States for the Eastern District of Pennsylvania to said Circuit Court of Appeals, erred in making its order on the twenty-ninth day of April, 1901, affirming the judgment of the said Circuit Court, and directing the mandate to issue to the said Circuit Court, directing that court to proceed in accordance with the decision and order of said Circuit Court of Appeals.

Third.—That the learned Circuit Court of Appeals for the Third Circuit erred in not making an order upon the law and evidence of the case reversing the judgment of said Circuit Court and directing the said

Circuit Court to enter judgment for the plaintiff in error and against the said defendant, The Fidelity Insurance, Trust and Safe Deposit Company, in the sum of $17,250 and interest thereon at six per centum per annum from December 3d, 1897, besides the costs, because—

(*a.*) That the evidence in the case equitably estops defendant in error to deny its holding and ownership of the one hundred and seventy-two and one-half Bank shares within the meaning of section 5151 of the Revised Statutes of the United States.

(*b.*) That the evidence in the case equitably estops the defendant in error to deny its liability as a shareholder to the creditors of the Bank within the meaning of section 5151 of the Revised Statutes of the United States.

(*c.*) That the voluntary act of defendant in error causing a transfer of the Bank shares on the books of the Bank from George B. Delamater and George W. Delamater to W. W. Hand, its authorized agent, to hold the same for its benefit, concealing said transfer from the Delamaters and their assignees, and without their knowledge, consent, or ratification, and without any notice at the time to the Bank of pre-existing pledge relations between it and the Delamaters so wronged and prejudiced the creditors of the Bank by thus discharging the Delamaters from all rights and liabilities as shareholders, under sections 5139 and 5151, Revised Statutes of the United States, that de-

fendant in error is equitably estopped to deny its liability as a shareholder to creditors within the meaning of section 5151 aforesaid.

(*d.*) That the voluntary act of defendant in error in transferring the Bank shares on the books of the Bank without consulting the Delamaters or their assignees, and without their knowledge, consent, or ratification, to W. W. Hand, its own authorized agent, thereby discharging the Delamaters from all liability as shareholders to the creditors and the authorized acceptance by its said agent, W. W. Hand, of a certificate therefor in his own name, for the purpose only of immediately transferring and assigning said certificate in blank to the defendant in error and the subsequent voting of the shares by said agent, by direction of the defendant in error, at meetings of the shareholders of the Bank, and its voluntarily voting the shares for and paying an assessment thereon when the capital of the Bank was impaired, and the continuous holding by it of the certificate for said shares, so assigned in blank that at any time they could be transferred on the books of the Bank into defendant in error's name, together with its admission to the Bank for the purpose of getting information that shareholders of the Bank only would be entitled to receive, that it was the owner and holder of the shares that stood in the name of W. W. Hand, and that the shares belonged to it and not to Hand, equitably estops defendant in error, when the Bank becomes

insolvent, to deny its liability as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States.

(*e.*) That the evidence in the case equitably estops defendant in error to deny its conversion of all the rights of a shareholder in said one hundred and seventy-two and one-half Bank shares from the Delamaters to its own beneficial use, and its consequent liability as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States.

(*f.*) That the defendant in error is equitably estopped from denying notice to it of the insolvency of the Delamaters prior to the transfer by it of the stock on the books of the Bank from the Delamaters to its own duly authorized agent, W. W. Hand.

(*g.*) That the evidence in the case equitably estops defendant in error to deny its right to receive dividends upon the one hundred and seventy-two and one-half shares, if any had been paid by the Bank, and to vote the shares through its duly authorized agent, W. W. Hand.

(*h.*) That all the evidence in the case equitably estops defendant in error to deny that it was the real and beneficial owner of the one hundred and seventy-two and one-half Bank shares within the meaning of section 5151, United States Revised Statutes.

(*i.*) The act of W. W. Hand in accepting the one hundred and seventy-two and one-half Bank shares,

and the certificate therefor, in his own name, and in holding himself out on the books of the Bank and on the list of shareholders as a shareholder of the Bank, was by direction of the defendant in error, and he acted entirely within the scope of his authority as its agent in so doing, and without the knowlege, consent, or ratification of the Delamaters, Delamater & Co. or their assignees, and his principal, the defendant in error, is equitably estopped by the authorized acts of its agent to deny liability as a shareholder within the meaning of Section 5151 of the Revised Statutes of the United States.

(*k.*) If W. W. Hand was pledgee simply of the one hundred and seventy-two and one-half Bank shares, their transfer to him on the books of the Bank, his acceptance of a certificate of ownership in his own name, the entry of his name on the list of shareholders, his voluntary payment of an assessment to make good impaired capital, and his voting the shares at meetings of shareholders, would equitably estop him to deny liability to creditors as a shareholder, under Section 5151 of the Revised Statutes of the United States; and if defendant in error were pledgee simply and W. W. Hand, within the scope of his authority as its agent, and by its direction, agreed to, and did, hold one hundred and seventy-two and one-half Bank shares in his own name without personal interest therein, and simply as representative and under direction of the defendant in error, and without any agreement be-

tween defendant in error or Hand and Delamaters or their assignees, or with the Bank, that the shares be held by Hand, as trustee, and without the knowledge, consent, or ratification of the Delamaters or their assignees, and without notice to the Bank of any pledge relation at the time of the transfer to Hand, defendant in error paying assessments to make good impaired capital, through its agent, and directing him as to voting the shares at the meetings of shareholders, and holding the certificate therefor duly assigned in blank, so that at any time the shares may be transferred upon the books of the Bank to defendant in error's name, the acts of the agent within the scope of his authority, equitably estop his principal, the defendant in error, to deny its liability to creditors as a shareholder, within the meaning of Section 5151 of the Revised Statutes of the United States, just as if the shares stood in its own name.

4. That the Circuit Court of Appeals for the Third Circuit erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said court.

ARGUMENT.

Defendant in error is estopped to deny ownership of the one hundred and seventy-two and one-half shares to the insolvent Bank's creditors.

Defendant upon all the evidence in the case is estopped when Bank has become insolvent to deny responsibility of a shareholder, within the meaning of sec. 5151, Rev. Stat. U. S., for the one hundred and seventy-two and one-half shares held in the name of its agent, W. W. Hand, because during Bank's solvency it repeatedly and positively asserted that it was the true owner and assumed the rights, powers, and duties of a shareholder, exercising its right to divest the legal title thereto, from George B. and George W. Delamater to itself, in the name of its agent, and because it impressed upon the officers of the Bank by its representations, admissions, and conduct that it was the real owner of the shares, entitled to be paid dividends, to vote and exercise all rights of ownership, and that if Bank recognized Hand other than as agent of defendant to its detriment, the Bank would be liable, and so impressed was Bank by reason of these representations of defendant that it was in truth the real owner of the shares that in due course of business for its own protection and for the protection of its creditors and shareholders it entered the name of

defendant in its stock ledger over the name of W. W. Hand as owner, and this entry in the stock ledger, together with entries in the Bank's stock certificate book and letters of defendant to Bank stating that it was owner, were open to the inspection of the creditors of Bank, and from these books was made up the official list of shareholders, and because depositors (creditors) of Bank will be presumed to have given to Bank credit relying upon these representations, claims, and acts of defendant believing it to be the real owner, and it is estopped to deny ownership because of its negligence in not advising the Bank of its true relation to the Delamaters and to the stock, and it is immaterial to the estoppel if defendant now shows that it was not the real owner of the shares, but pledgee only. Its mouth is closed to now make this defense to the prejudice of creditors, thereby contradicting its avowal of true ownership made during solvency of Bank and upon which avowal the creditors relied.

ASSIGNMENTS OF ERROR RELIED UPON TO ESTABLISH ESTOPPEL.

"3. You must find a verdict for the plaintiff for the amount of his claim." (Page 154.)

And to the answer of the court to the sixth point of defendant asking for binding instructions in words as follows, to wit:—

"That point is reserved. I shall put it in this form, 'the court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim.'" (Page 156.)

12. "That the said court erred in giving the following instruction in its general charge to the jury, namely, that the whole subject is a question of fact and not of law. The contention of plaintiff in error being that the defendant is estopped by the evidence produced at the trial as a matter of law from denying its liability for the assessment." (Page 154.)

The part of the charge objected to is in words as follows:—

"The whole subject, as I regard it, for the present at least, is a question of fact; and that question, I repeat, is whether the defendant company—the Fidelity Trust Company—was at the time when this Bank went into the hands of the Receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters." (Pages 113, 114.)

And the refusal of the trial court to give to the jury plaintiff's first (pages 152, 153) and fifth (page 154) points.

15. That the said court erred in giving the following instruction during the course of the charge to the jury, to wit: "The burden of proof is upon the plaintiff to show, to prove to you by the fair weight of the evidence, that the defendant was the real owner of this

stock; and if you are unable to come to that conclusion, if the evidence is so balanced that you cannot reach that point, if your minds are unable to decide that the defendant was the real owner, then the plaintiff has failed, and your verdict must be for the defendant." (Page 155.) (Charge to jury, page 116.)

1. That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause, an entry in the stock ledger of said Bank, over the name of W. W. Hand, in an account opened with said W. W. Hand, at the request of the defendant corporation, showing the holding and ownership of one hundred and seventy-two and one-half shares of the stock of said Bank, being the stock in issue in this case, and for the collection of the assessment ordered by the Comptroller of the Currency upon which the defendant is sued, the said stock ledger having first been admitted in evidence, the witness (Higgins), while testifying to the entries in said book was about to state that written over the name of W. W. Hand in the stock ledger of the Bank, in the hand-writing of its cashier, were the words "The Fidelity Trust and Safe Deposit Company, Phila., Pa.," that the entry there had been made in the regular course of business, and at the time the certificates, at the instance of the defendant, were issued in the name of W. W. Hand, pursuant to written instructions from the defendant corporation to the Bank; that it was the owner of the stock standing in the name of W. W.

Hand, and intending to follow the same up by showing that this book for many years, with this entry of the name of the defendant corporation written over that of W. W. Hand, together with letters from the defendant corporation stating that it was the owner of the stock, had been open to the inspection of the shareholders and creditors of the Bank long before its failure, and that the entry was made by the officer of the Bank for the purpose of advising the shareholders and creditors of the Bank of the information they had that the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia was the real or beneficial owner of the stock which stood in the name of its agent, W. W. Hand. (Page 149.) (Testimony of George H. Higgins, pages 20, 21, 22. Testimony of Joseph I. Towne, pages 48, 49.)

That the said court erred in refusing to permit counsel for plaintiff in error to introduce in evidence at the trial of said cause the following testimony contained in the deposition of John O. McClintock, a witness produced upon behalf of the plaintiff and one of the assignees for the benefit of creditors in the deed of assignment made by Delamater & Co. (Testimony of John O. McClintock, pages 68, 69, 70.)

"Q. Did you make a further account in the matter of the assignment of Delamater & Co. as assignees? If so, state when and what, if anything, was said, to the best of your recollection, in that account in regard to the charge made against you on account of

the two hundred and thirty shares of stock of the Keystone National Bank, heretofore referred to in this deposition.

"A. On the 13th of July, 1896, we, the assignees of Delamater & Co., filed in the above-mentioned case our final account. In this final account we were charged with this item referred to in the question as follows: 'Equities in stocks and bonds pledged as collateral on loan unadjusted, as follows: (*a*) $23,000, stock of the Keystone National Bank of Erie pledged for the loan of the $15,000 appraised at $8000,' and we were credited with item No. 48 as follows: 'Accountants claim credit for the item of $23,000 Keystone National Bank stock pledged for loan of $15,000 charged at $8000.'" (The trial court admitted the testimony to this point, excluding what follows): "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged."

"Q. Was this credit in your second and final account allowed by the court?

"A. It was. The account as filed was finally confirmed by the court.

"Q. Will you state when and where it is recorded?

"A. It was finally confirmed and allowed on the first Monday of August, 1896, and is recorded in the Account Book No. 1, at page 539 of Records of the Court of Common Pleas of Crawford County, Pennsylvania.

"Q. This final account of yours, as assignees of Delamater & Co., was filed, then, more than one year after your meeting with the defendant company on or about the 1st of May, 1895? What connection, if any, had that meeting with your statement in your account with reference to this account?

"A. In relation to this equity?

"Q. Yes.

"A. The statement made by us in our claim of credit for this item of $8000 was made from the information obtained by us in our interview with the officer of the defendant company on or about the first of May, 1895."

4. That the said court erred in refusing to permit counsel for the plaintiff in error to introduce at the trial the following testimony in the deposition of George W. Haskins, one of the co-assignees for the benefit of creditors of Delamater & Co. and a witness produced upon behalf of creditors of plaintiff in error as follows, to wit (testimony of George W. Haskins, page 82) :—

"Q. I hand you the final and last account that you filed in that assigned estate, and ask you to look at item No. 48 and refresh your memory in regard to it and state the matter therein set forth.

"A. In our final account, item No. 48, the accountants claim credit for the item of $23,000 Keystone National Bank of Erie stock pledged for the loan of $15,000 charged at $8,000." (The trial judge ad-

mitted this much of the answer, but refused to admit what follows in this answer and the following answers here quoted.) "Said stock having been converted by the holder of the note and said stock having been assessed to the amount of twenty-five per cent. of its face value, did not sell for enough to pay the debt for which it was pledged." This final account was allowed and approved by the Court of Common Pleas of Crawford County, Pennsylvania, in the matter of the assignment of Delamater & Co., entered to No. 52 February term, 1891.

"Q. When was the account finally confirmed?

"A. On the first Monday of August, 1896."

And the third assignment of error, (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), (*i*), (*k*). (Pages 156, 157, 158).

The refusal of the trial court to permit plaintiff in error (as shown by the first assignment of error, page 149) to show to the jury the entry of the name of defendant as a shareholder on the stock ledger of the Bank was clearly error, for no stronger evidence could have been produced to prove the impression made upon the Bank's officers by the representations of ownership made by defendant, and this book was open to the inspection of creditors and shareholders and from it the list of shareholders was made up.

The reasoning of counsel for defendant against the introduction of this evidence, which seems to have been adopted by the trial court, was, in brief, that the entry was irregular, it being written with a lead pencil in-

stead of with pen and ink, and that its irregularity was such that it was incompetent as evidence tending to prove the legal ownership by defendant of the shares and that the books were not evidence in themselves to establish the fact of ownership, against persons charged as stockholders. The court's ruling was in keeping with the view shown to be held by it throughout the entire trial, to wit, that it was necessary to prove that defendant was, in fact, the real owner of the shares; whereas the contention of the plaintiff in error was and is that it is not necessary to show that the defendant is in truth the real owner of the shares, but that it has made such representations and admissions and its conduct throughout was such that the Bank was impressed by it with the belief that it was the real owner of the shares; that it concealed everything that would lead to a contrary belief, and that the Bank was so impressed with the defendant's ownership of the shares that in the regular course of its business it did make a memorandum on its books, for its own protection, to the effect that Hand was simply an agent of defendant and that defendant was the true owner, and that this entry being made upon the book from which the list of stockholders was made up and a book, under the law, open to the inspection of the creditors and shareholders of the Bank, it will be presumed that the creditors relied upon the belief that the defendant was the real owner of one hundred and seventy-two and one-half shares of the Bank's stock and dealt with the Bank

upon the credit of the defendant, and that the defendant is now estopped to deny, when the Bank becomes insolvent and to the prejudice of depositors, that it is not the real owner of the shares. For this reason, in order to establish the estoppel, the entry is admissible as evidence, and it was error to exclude it.

In **Carey vs. Williams,** 79 Fed., 906 (1897), Wallace, C. J., delivering the opinion of the court, on page 912 says :—

> " The true ground upon which the books of a corporation, showing who are shareholders, are admissible in evidence is that they are the best evidence of the assent of the corporation to the contract of membership. Until that assent is proved, the contract is not complete, and no person who has bought shares of stock can be subjected to the liability of a stockholder. When it appears that a person has subscribed for or purchased shares, has voted upon them, has received dividends upon them, *or in any way has consented to occupy the relation of a stockholder,* the contract of membership on his part is shown ; and the stock books become competent evidence, because they show that the corporation has likewise consented."

The facts in the case at bar come within this ruling. The legal title to the shares was placed by defendant in the name of its agent, and through its agent it exercised all the rights of a shareholder, voting the shares, &c. It notified the Bank that it was the owner of the shares, thereby consenting to be a shareholder; the Bank accepted the defendant as a shareholder, and, in evidence of its consent, entered its name upon the

books. The evidence of this consent by the Bank was, therefore, admissible, for this reason as well as that already stated.

See, also—

Turnbull vs. Payson, 95 U. S. 418.

In Cook on Corporations (fourth edition), section 249, it is said :—

> "Sometimes a subscription for stock is made by one person as the agent for another, and the stock is entered on the corporate books in the name of the agent. In such a case it is the rule that corporate creditors may hold either the principal or the agent responsible on the stock. An agent who is compelled to assume and pay charges on the stock may recover from his principal the amount so paid. Where a transfer is made, not to the principal himself, but to the agent, the latter is but a nominal holder, and is subject to the rules applicable to such."

In Greenleaf on Evidence (Lewis' edition, 1896), vol. 2, sec. 59, it is said :—

> "An agent is one who acts in the place and stead of another. The act done, if lawful, is considered as the act of the principal. It is not always necessary that the authority should precede the act; it may become in law the act of the principal by his subsequent ratification and adoption of it. The vital principle of the law of agency lies in the legal identity of the agent and the principal, created by their mutual consent."

The refusal of the trial court to permit the witnesses John O. McClintock and George W. Haskins (assignees of Delamater & Co.) to testify before the jury

that their memory was refreshed and recollections confirmed as to the representations made by the officers of the defendant company to them on or about May 1st, 1895, by their own official report, in which was the following written statement, made by them as assignees, was error:—

> "Accountants claim credit for the item of $23,000 Keystone National Bank stock, pledged for loan of $15,000, charged at $8,000, said stock having been converted by the holder of the note, and said stock having been assessed to the amount of 25 per cent. of its face value, did not sell for enough to pay the debt for which it was pledged." (Pages 66 to 70, inclusive, 82, 83.)

Plaintiff in error duly excepted to this ruling at the trial, and his exception was noted, and the point is brought to this court by assignments of error Nos. 3 and 4. (Pages 150, 151.)

In Greenleaf on Evidence (Lewis' edition, 1896), section 436, it is said:—

> "Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and *assist his memory by the use of a written instrument*, memorandum, or entry in a book, and may be compelled to do so, if the writing is present in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and re-

members that he then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence; for, if inadmissible in itself, as, for want of a stamp, it may still be referred to by the witness."

The two hundred and thirty shares prior to March 1st, 1889, belonged to and stood in the name of George B. and George W. Delamater, who had executed blank assignments and powers, and sold, transferred and delivered them to Delamater & Co., and on March 1st, 1889, individually, the two Delamaters were not owners of the shares; they were the property of the firm of Delamater & Co. George B. and George W. Delamater, individually, owned no interest in the shares, at least after March 1st, 1889. Delamater & Co. delivered them by the same blank assignments and powers to the defendant, who held them as a pledge to secure the firm's note. Defendant knew that the shares belonged to the firm, and it held the shares under the blank assignments and powers made as aforesaid for nearly two years. When the firm, on December 5th, 1890, failed, it conveyed by deed all of its contingent interest in the shares to assignees for the benefit of creditors (pages 110, 111), and from that date Delamater & Co. had no further interest therein, because of its insolvent condition. The supposed equity of $8,000 passed to the assignees, Messrs. Haskins & McClintock. The bare legal title, however, still stood upon the books of the Bank in the names of

George B. and George W. Delamater, and, as holders of that legal title, they were entitled to vote the shares, to be paid dividends, and exercise all the rights of shareholders so far as the Bank was concerned; certainly, if no notice had been given to it that they were no longer owners, and there was no notice of any kind to that effect, they were, also, individually responsible to creditors, within the meaning of Section 5151, *supra*. The assignees of Delamater & Co., after December 5th, 1890, had only a contingent interest in the shares; it was subject to the claim of defendant in error; they never held the legal title on the books of the Bank, and, therefore, never had the right to vote and to be paid dividends, nor were they subject to the liability of creditors. Defendant had actual knowledge of the assignment by Delamater & Co., for, on December 17th, 1890 (twelve days afterward), it wrote a letter to the assignees. (Page 93.) When, therefore, on January 10th, 1891 (pages 34, 35), defendant made use of the blank assignments and powers controlling the shares (which it had heretofore held as pledgee) by writing in the blank space for transferee the name "W. W. Hand" (page 30), surrendering the certificates to Bank (pages 31, 34, 35) and taking from the Bank new certificates dated January 15th, 1891 (pages 36, 37, 38), it took to itself, in the name of its agent, the legal title to the shares, and divested George B. and George W. Delamater of the bare legal title which they had held to that time. On

January 15th, 1891, therefore, the defendant was not only pledgee, but it became mortgagee; it not only had the constructive possession of the two hundred and thirty shares as pledgee, but it held the legal title as mortgagee thereafter. It was not a question of turning over to the pledgor, upon payment of the note, the constructive possession of the shares, which it held by reason of the blank assignments and powers, and which holding made it in no wise responsible to creditors, but it became a question of re-conveying the legal title to the shares upon payment of the note, not to George B. and George W. Delamater (who, prior to 1889, had conveyed all their interest in the shares to Delamater & Co.), not to Delamater & Co. (who, by their deed of assignment, had conveyed all their interest in the shares on December 5th, 1890), but to George W. Haskins and John O. McClintock, assignees, for the benefit of creditors of the almost worthless estate of Delamater & Co. (who, under Section 5152, Revised Statutes, would not have been personally responsible to creditors).

In *Casey vs. Cavaroc*, 145 U. S. 467 (1877), this court says on page 477, "The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge (Pothier, Nantissement 8) and if possession be once given up, the pledge as such is extinguished. The possession need not be actual, it may be constructive. In some cases such constructive delivery cannot be affected

without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that character. Such an assignment is necessary where a pledge is proposed in order to give the constructive possession required to constitute a pledge, and yet it formally transfers the title also. *In such a case there is a union of two distinct forms of security: that of mortgage and that of pledge; mortgage by virtue of the title and pledge by virtue of the possession.*"

If there was an equity in the shares, after payment of loan to defendant as before stated, it belonged to the assignees of Delamater & Co., who were never shareholders liable to creditors, not to Delamater & Co., certainly not to George B. and George W. Delamater, yet, as has been said, until January 15th, 1891, the bare legal title to these shares was registered in the name of George B. and George W. Delamater on the books of the bank, and until that date they had the legal right to draw dividends, vote the shares, and exercise all the powers of complete ownership and defendant alone had the power to take away these legal rights. It exercised this power by transferring this legal title on the books of the bank from them to W. W. Hand and by this act of defendant, all responsibility to creditors and all and every right of a shareholder was divested from them, and the Delamaters ceased absolutely from that moment to be responsible to creditors for the contracts, debts and engagements of the Bank, under section 5151, Rev. Stat., U. S., and defendant, to use language of

Mr. Justice Strong in **National Bank vs. Case** (*infra*) is liable because "by taking the legal title he has released the former owner."

It is important in this case to clearly fix upon whom the responsibility for this transfer fell. Who is now *holder* of these shares within the meaning of section 5151, *supra?* W. W. Hand, the agent, or defendant, his principal?

The fortunes of George B. and George W. Delamater, since the failure of Delamater & Co. (twelve years ago) may have so changed that the Receiver, if within six year limit of the Pennsylvania statute which began to run December 3, 1897, when assessment here sued on was ordered payable by Comptroller, might still recover from them, if this court decided upon the facts in this case, that they are still shareholders, liable to creditors, under sections 5139 and 5151 Rev. Stat., U. S., for **it is assumed that it is the intention of the National Bank Act in providing for this assessment that shareholders, solvent or insolvent, to the extent of every share of its capital stock, must be found for the entire assessment of $150,000,** and if George B. and George W. Delamater are not shareholders responsible to creditors, by reason of the transfer by defendant of January 15th, 1891, it is clear that creditors can look for payment to no other than defendant or W. W. Hand, agent. With this understanding the Comptroller and Receiver, acting for creditors, have elected to hold defendant as principal.

Attention is called to the importance of the fact that this act of the defendant in transferring the shares from the Delamaters to Hand was perfected before default in payment of Delamater & Co.'s note.

The defendant, without an express agreement (as there was in **Anderson vs. Philadelphia Warehouse Co.**, 111 U. S., 479, between pledgors, Bank and pledgee) was authorized because of its holding blank assignments and powers, to transfer shares on books of the Bank to its own name or that of its agent, and not otherwise, and could not, under the simple contract of pledge, sell the shares before default in payment of note. Defendant must, therefore, upon the facts in this case, be held to have put the shares in the name of W. W. Hand as its own agent, and the implied contract liability to creditors because of the holding, contracted by its agent, under Section 5151, *supra*, at the moment of transfer, attached to defendant as principal, and defendant is estopped when the Bank becomes insolvent to deny to creditors this responsibility of a shareholder, even though pledgee only.

In **Priestly vs. Fernie**, 3 Hurlston & Coltman's Rep. 977, in Exchequer of Pleas, the master of a ship was sued to judgment and after judgment was adjudged a bankrupt, and thereupon the plaintiff sued the owners of the ship for whom the master was agent, and the owners of the ship set up the judgment against the master as a bar to the action against them :—

It was held by the court "that the action against the owners was barred for the reason that the owners were liable to the master to indemnify him upon the judgment against him he having been elected by the plaintiff for suit, it being admitted that the plaintiff had the election to either sue the master or the owners, and it was held that if a judgment was now taken against the owners they would be held for the same claim twice, and that the principal applied even in case of a master of a ship. It was also held that this right to elect, as between the agent and principal applied only when the principal was undisclosed, but if the principal was disclosed by the agent, the right to sue the agent was not clear, the principal being the proper party to sue."

Bigelow on Estoppel (5th Ed.), 124.

In **Kingsley vs. Davis,** 104 Mass., 178 (1878), the plaintiff was a real estate broker who sold certain real estate at the instance of John J. Davis, supposing the title to be in him, whereas the title was in the name of his wife, The action was for commissions for making the sale; a judgment was taken by default against John J. Davis, but was uncollectible. Afterwards the fact appeared that he was not the owner of the property and an action was begun against his wife, Charlotte Davis. And the Supreme Judicial Court says on pages 179 and 180:—

"But the true inference to be drawn from the facts stated undoubtedly is that the plaintiffs contracted with and gave credit to John J. Davis, and they now claim that he was acting as the agent of the defendant, and that they gave him credit in ignorance of this fact. If we assume that he was acting as her agent in contracting with the plaintiffs, yet there is an insuperable obstacle

to their right to maintain this action. The general principle is undisputed that when a person contracts with another who is in fact an agent of an undisclosed principal, he may, upon discovery of the principal, resort to him or to the agent with whom he dealt at his election. But if after having come to a knowledge of all the facts he elects to hold the agent, he cannot afterwards resort to the principal. In the case at bar it is admitted that the plaintiffs, after all the facts became known to them, entered a judgment against John J. Davis upon the same cause of action for which this suit is brought (against his wife, Charlotte Davis.) We are of opinion that this was conclusive evidence of an election to resort to the agent to whom the credit was originally given, and is a bar to this action against the principal."

In the case now before the court the principal was disclosed to the Bank, its officers, shareholders, and creditors. It would have been hazardous, therefore, for the Receiver to undertake to hold the agent, Hand. It is questionable whether he could be held on the ground of estoppel, because the creditors knew that he was not the owner of the stock, and that defendant was the owner. We submit, therefore, that the only proper party for the Receiver to pursue for the collection of this assessment is defendant.

It is important to notice here that this transfer from the Delamaters individually to Hand was perfected two days before the maturity on January 17th, 1891, of Delamater & Co.'s note. This title could legally have been taken only by defendant itself or to its own agent, when done, as in this case, **before maturity of note and without the knowledge, consent, or ratifica-**

tion of George B. and George W. Delamater, Delamater & Co. or their assignees, and an agreement between them and the Bank, as in **Anderson vs. Philadelphia Warehouse Co.**, 111 U. S., 479, made at the time the contract of pledge was entered into.

These blank assignments and powers of the Delamaters were in the usual form (page 112), and the new certificates issued by the Bank for the two hundred and thirty shares were not delivered to the possession of W. W. Hand and never were in his custody, but were delivered to and always were in the custody of defendant (pages 25, 26), **it being noted on the stubs of the Bank's stock certificate book "Sent to the Fidelity Insurance, Trust and Safe Deposit Co., of Phila., Pa. 1/17/91."** (Pages 36–40). W. W. Hand, at the request of defendant, immediately executed an assignment and power in the same form as that afterward executed February 10th, 1893. (Page 112). We submit, therefore, that if it was the intention of the defendant to take title to the shares before maturity of the note, except to itself, it was a conversion of the shares. **There is absolutely no evidence that Hand was or is an irresponsible person financially, nor that defendant had any fear whatsoever of the responsibility of a shareholder consequent upon holding the stock in its own name**; it was a corporation; it was more convenient to have it in the name of an agent, and all defendant's subsequent conduct, representations, and acts conflict with the thought that its purpose in taking title to the shares in the name of Hand

was because of any fear of responsibility to the Bank's creditors. The stock was considered worth par—$8000 more than the loan. The Bank for about twenty-seven years had paid regularly semi-annual dividends. (Pages 50–53). It was the time of the year when a dividend was due, **and in fact on January 13th, 1891** (page 50), three days after the surrender of the Delamater certificates by the defendant and two days before the transfer was completed and new certificates issued, one was declared of two per cent. (on two hundred and thirty shares amounting to $460) ; it does not appear that this dividend was paid to defendant nor to the assignees, **but it is fair to presume from all the evidence that the object of defendant in making this sudden transfer of the legal title to its agent, Hand, was to control the dividends and vote the shares.**

In **McAllister vs. Kuhn** (1877), 96 U. S., 87, Mr. Chief Justice Waite, delivering the opinion of the court, says on page 89 :—

> " In this case the complainant alleges a wrongful conversion by McAllister to his own use of certain shares of the capital stock of a foreign corporation owned by Kuhn, which were represented by certificates of stock that had come into the possession of McAllister. There can be no doubt that shares of stock in a corporation may be transferred by means of an assignment and delivery of certificates. It is true that a certificate of stock is not the stock itself; but it is documentary evidence of title to stock, and may be used for the purpose of symbolical delivery, as the stock itself is incapable of actual delivery.

A blank indorsement of a certificate may be filled up by writing an assignment and power of attorney over the signature indorsed, and in this way an actual transfer of the stock on the books of the corporation may be perfected. A wrongful use of such an indorsed certificate for such a purpose may operate as a conversion of the stock."

On May 5th, 1891, defendant wrote to assignees of Delamater & Co., at Meadville, Pa., as follows:—

"PHILADELPHIA, May 5th, 1891.

"*Assignees of Delamater & Co., Meadville, Pennsylvania.*

"GENTLEMEN: I herewith enclose a copy of a note addressed this day to Delamater & Co. As the business concerns you as their Assignee I trust you will be able to settle the note and avoid the necessity of selling the collateral.

"Yours resp'ly,

"R. PATTERSON,

"*Vice President.*"

Accompanying this letter was one dated the same day, reading as follows:—

"PHILADELPHIA, May 5th, 1891.

"*Messrs Delamater & Co., Meadville, Penn'a.*

"GENTLEMEN:—I have to renew the call heretofore made on you for payment of your note of $15,000 dated Nov. 15, 1890, due at sixty days. The time expired Jan. 17th, last. The note carries 6% interest from its date. It is secured by 230 shares of the Keystone Na. Bank of Erie, and if we cannot secure payment, for the note and interest *I have to notify you that we shall proceed to sell the collateral at auction.*

"Yours respectfully,

"R. PATTERSON,

"*Vice-Pres't.*"

(Page 71.)

Attention is called to the following statements in this letter: **"As the business concerns you as their Assignee, I trust you will be able to settle the note and avoid the necessity of selling the collateral." "And if we cannot secure prompt payment for the note and interest I have to notify you that we shall proceed to sell the collateral at auction."** R. Patterson, who wrote this letter, was then vice-president of defendant; he has not been connected with defendant for many years and could not be obtained to testify. Charles Atherton before the trial was paralyzed and, being spechless, could not testify. It is claimed by plaintiff in error that this notice to the assignees given by defendant on May 5th, 1891, of intention to sell at auction, when at a public sale they may have had the right, under the collateral agreement, to buy the shares, **shows the intention of the defendant so to do, and defendant failed to show in this case that such formal sale at auction had not been made at the instance of either Mr. Patterson or Mr. Atherton** for account of defendant shortly after May 5th, 1891, and that a change in title was unnecessary as already the shares stood in the name of defendant's own agent.

The testimony of Mr. Gest refers to the efforts of the defendant to sell the shares at private sale and does not relate to a former formal sale at auction that might have been made at the instance of Mr. Patterson or Mr. Atherton, who had full charge to perfect title in the defendant. It is claimed further that this letter of May 5th, 1891, written by defendant to as-

signees of Delamater & Co., **bears intrinsic evidence that four months after transfer of title to Hand, defendant claimed full control of the shares and notified assignees of its intention to sell at auction, thus showing that Hand's holding was considered by defendant its own.** It is also important in this connection to note that **the transfer of the shares to Hand was concealed from the assignees in this letter,** and, indeed, it was concealed at all times from them until defendant was pressed by the assignees for a definite answer on or about May 1st, 1895, four years later.

On July 7th, 1892, defendant wrote the following letter to assignees of Delamater & Co. :—

"PHILADELPHIA, JULY 7th, 1892.

"GENTLEMEN :—We acknowledge the receipt of yours of July 6th and herewith enclose to you a copy of a letter which we have this day addressed to F. P. Ray, Auditor.

"Yours, truly,

"R. PATTERSON,
"*V. Prest.*

"*To Messrs. Geo. W. Haskins & John O. McClintock, Att'ys of the Assigned Estate of Delamater & Co., Meadville, Pa.*"

The letter inclosed the original which was addressed to Mr. Ray, and reads as follows :—

"PHILADELPHIA, July 7, 1892.

"DEAR SIR :—At the suggestion of the Assignees, we send you statement of our claim against the assigned estate as follows :—

"Note of Delamater & Company drawn to our order

for Fifteen Thousand Dollars dated November 15th, 1890, payable sixty days after date. As collateral security for the loan, we hold Two hundred and thirty (230) shares of the Keystone National Bank of Erie.

"Of this note we enclose herewith a copy.

"If any further proof of our claim is required, Please advise us and we will endeavor to comply with your request. I am,

"Yours very truly,

"R. PATTERSON,
"*V. Prest.*

"*To F. P. Ray, Esq., Auditor of the Assigned Estate of Delamater & Company, Meadville, Pa.*"

(Page 74.)

This letter was also written by R. Patterson, vice-president, and in it the fact of the transfer to Hand, one and one-half years before, is concealed. This last letter relates to a proof of defendant's claim against the assigned estate of Delamater & Co. in order that they may be paid the dividend. This dividend, $795.60, was paid March 30th, 1893. (Page 76.) It was for $5\frac{6}{10}$ per cent. (Page 73.)

These two letters of May 5th, 1891, and July 7th, 1892, **are convincing evidence that defendant regarded Hand as its own agent for the holding of the shares,** for, although written four and eighteen months, respectively, after the transfer to Hand, on January 15th, 1891, defendant conceals that fact from the assignees and holds itself out to them as being still the holder of the shares, for in the first letter it says: **"I have to**

notify you that we shall proceed to sell the collateral at auction;" and in the second it says: **"As collateral security for the loan, we hold two hundred and thirty shares of the Keystone National Bank, Erie."**

It will be noted that while defendant, in its letters to Delamater & Co. and their assignees, concealed the fact of the transfer to Hand, in its letters to Bank it concealed the pledge relation between Delamater & Co. and itself, and affirmed its ownership of the shares. The purpose is apparent, for, if it were known to the assignees that the shares had been converted by defendant to its own use, objection might have been raised as to any payment of dividends to defendant upon the note in the distribution of the assigned estate, and, indeed, an action might have been brought by the assignees against defendant for damages for its conversion, and if it had been known to Bank that defendant held the shares as pledgee only, the Bank might have questioned the right of defendant to vote the shares, and to be paid dividends, and receive statements of its financial condition and other information in regard to its management, to which shareholders only were entitled.

This is an action at law, and the use of the term "equitable" estoppel in the assignments of error is, technically, perhaps, incorrect. **The estoppel upon the facts in this case is an estoppel at law;** it is not an equitable defense in any sense, although, in the practice in Pennsylvania, "equitable

estoppel" and "estoppel *in pais*" are commonly used where estoppel at law is meant.

In **Kirk vs. Hartman** (1870) 63 Pa. St., 97, it is *held*—

> "If one holds himself out, or knowingly suffers himself to be held out as a partner, on the faith of which others trust or enter into a contract with the firm, he is responsible, although not a partner."
>
> "Estoppels shut the mouth of a party, whether his original act or declaration was intended to deceive or not."

And, on page 106, Mr. Justice George Sharswood says in his opinion:—

> "The eighth error assigned is to the instruction "that if Mr. Bailey induced plaintiff to believe that he was the partner of Hartman in this transaction, he is now estopped from denying the partnership." Nothing certainly is more firmly established than that if a man holds himself out, or knowingly suffers himself to be held out, as a partner, on the faith of which others trust to enter into contracts with the firm, he is responsible, whether he is in point of fact interested as a partner or not: Collier on Partnership, Section 86. It is not important for what reason the rule was established. It was, says Mr. Collier, 'upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it to only two of them, to whom, without the others, they would have lent nothing.' It may, however, very well stand upon the ground of estoppel. All estoppels shut the mouth of the party, because it would be a fraud in him to speak, whether his original act or declaration was intended to deceive or not."

This case is interesting, because the representations made were by letters, and in the letters there was no positive representation of partnership, but the court held that that conclusion was the only one fairly to be drawn. In the case at bar the representation of ownership of the shares was positive.

Morawetz on Private Corporations, vol. II., section 870, states the relationship between shareholders and creditors as follows:—

> "If the company's charter provides that the shareholders shall be subject to a special individual liability to creditors, persons becoming shareholders agree to become liable, both in a corporate capacity and individually, to all persons who shall give credit to the corporation. They offer to all the world to become liable in their corporate capacity to the extent of the capital which they have agreed to contribute for the purpose of carrying on the company's business, and they offer to become liable individually to the amount expressly provided by their charter or incorporation law. Parties who contract with the corporation contract upon the faith of this liability held out as their security; and the offer of the shareholders, being thereby accepted, ripens into a binding contract."

In **Hobart vs. Johnson,** 8 Fed. Rep., 495 (1881), Blatchford, J., says:—

> "Every creditor of the bank, becoming such, becomes, *eo instante*, a creditor of the shareholder in respect to the liability in question. The shareholder becomes thereby a principal debtor. The debt of the bank is his debt at the instant of its creation, and the debt of the bank is re-

ferred to only as a measure of the debt of the shareholder. * * * The idea of guaranty or suretyship, or of a promise to pay the debt or answer for the liability of another, is altogether destroyed by the fact that the debt of the bank is incurred for the benefit of the shareholders exclusively, and is thus the debt of the shareholder as a principal."

In **Langtry vs. Wallace,** 97 Fed. Rep., 867 (1899), the court says:—

"All persons are, in law, presumed to extend credit to corporations, and especially to national banks, whose shares are subject to a double assessment, in reliance upon the amount of their issued capital stock, although they do not know accurately by whom such stock is at the time held."

In **Upton vs. Englehart,** 3 Dill., 496, Fed. cas. No. 16,800 (1875), the court says:—

"If a person has accepted a certificate of stock, and becomes, to all external appearances, a stockholder, persons may have become creditors of the company on the faith of his membership, and in law are presumed to do so."

In **Schalucky vs. Field,** 124 Ill., 617 (1888), the charter of the Illinois Bank provided that—

"When default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of stock held by them respectively, &c."

The court says :—

"The stockholders, with respect to their personal liability under such a provision as section 9, are, in effect, partners, and are liable, as such, to the creditors of the corporation to an amount equal to the amount of stock held by them respectively. The stockholders in the German Savings Bank assumed a primary liability to the creditors to pay the indebtedness of the bank to the amount stated in section 9. When a debt was contracted by the bank, the liability of those who were then stockholders, attached, and from that moment they became bound in the same manner and with like effect as if they had been doing business as partners unincorporated, except that the liability of each stockholder was limited to an amount equal to the amount of stock held by him."

In **Sawyer vs. Hoag**, 17 Wall., 610 (1873), Mr. Justice Miller clearly defines how the contract between the creditor and stockholder should be viewed. He states :—

"After all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation, is to be effected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be affected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

It is urged by defendant's counsel that the following expressions found in defendant's letters were actual notice to the Bank that it held the shares as pledgee only :—

In that of April 4th, 1894 (page 108)—

> "As we have a loan of $22,000 depending on the value of 172½ shares, we desire the above information."

March 17th, 1897 (page 46)—

> "We are anxious to sell the stock to close an account."

March 20th, 1897 (page 108)—

> "We wish to close the account for which this is collateral."

April 8th, 1897 (page 108)—

> "We are anxious to sell this stock to close an account."

Taking up the letters in the order just quoted, the first one was written more than three years after issue on January 15th, 1891, of the certificates for two hundred and thirty shares into the name of Hand and not the slightest word had been spoken to the Bank of a pledge relation between Delamater & Co. and defendant by any one, and no such word is spoken in this letter of April 4th, 1894. The part quoted may mean that a loan was then in contemplation, and this letter must be construed with that written by defend-

ant a few days before on March 20th 1894 (pages 32, 33), in which it is stated by defendant:—

> "This company holds 172½ shares of your Bank registered in the name of W. W. Hand. * * * We would like to sell our holdings, if marketable."

The letter of April 7th, 1894, of the Bank in reply (page 107) shows that it had no other thought than that defendant owned the shares.

The three letters of March 17th and 20th, and April 8th, 1897, are practically one letter; they were written more than six years after the original transfer to Hand, and more than four years after the issue of the reduced number of shares to Hand (Certificate No. 236, page 112). The Bank's cashiers had been changed two or three times, and the president had been changed. During all that time not one word had been spoken to the effect that Delamater & Co. had borrowed of defendant, and that the shares were in pledge. This fact had been concealed. Defendant had paid the assessment because of the impaired capital; it had voted for a reduction of capital, and accepted a reduced number of shares in lieu of the two hundred and thirty shares. In the letter of April 8th, 1897, the defendant says, "Since we have held the stock, we paid an assessment and the number of shares reduced." There is nothing in the letters of March 17th and April 8th, 1897, that would indicate a pledge, but the contrary; the statement is the

same in both. "We are anxious to sell this stock and close an account." The statement in the letter of March 20th, 1897, "We wish to close the account for which this is collateral" only needs attention. The letter in full is as follows:—

> "*This company owns 172½ shares of the stock of your Bank registered in the name of W. W. Hand. We would be much obliged for any information you can give us in regard to the business of the Bank or a copy of the last statement to the Comptroller. Has there been any sales of the stock within the last year? If so at what price.* We wish to close an account for which this is collateral. *If you can put us in the way of finding a customer we will pay you the usual commission.*"

The letter of March 17th, 1897 (three days before) (page 46), says:—

> "This Company owns 172½ shares of stock of your bank, registered in the name of W. W. Hand. * * * We are anxious to sell the stock to close an account. If you can put us in the way of finding a customer we will pay the usual commission."

And the letter of April 8th, 1897 (page 108) (nineteen days after), which was a summary of letters of 17th and 20th March, 1897, was as follows:—

> "March 17th I addressed a note to F. V. Kepler, supposing he was still cashier of your bank. He said he was not connected with the bank, and referred me to you. *On March 20th I wrote you this Company owns 172 1/2 shares of the stock of your bank registered in the name of W. W. Hand.* Since we have held the stock we paid an assessment and the number of shares reduced. We

have no knowledge of the bank's affairs. We would like to have a copy of the last statement to the Comptroller and any other information in regard to the business of the bank you will give us. Are there any market for the stock and at what price? We are anxious to sell this stock to close an account. If you can put us in the way of selling the stock *we will pay a commission.*"

And the letter written by the Bank in reply to this group of three letters shows that the Bank was impressed only by the assertion of defendant's ownership of the shares and its desire to sell them, and it shows clearly that it had no knowledge or suspicion that the shares were held simply as pledge. That letter of date April 14th, 1897 (page 107), is as follows:—

"Enclosed *find report of this Bank March 9th, 1897.* As regards sale of the stock, I think there would be a poor chance at the present time. Since our trouble of several years ago we have made no dividends, the condition of business being such that it has not been advisable to do so. Business is picking up in this locality. Should it continue we will get our share of it and be able to make dividends. Now, then will be a chance for a sale of stock. I will keep this matter in mind, and should I find a chance for a sale will let you know. I have been out of the City, thus the delay in answering yours of the 8th."

In two of the letters defendant says, in effect, to the Bank: We own one hundred and seventy-two and one-half shares, Hand is our agent. "We are anxious to sell the stock to close an account," a commission will be paid if you find us a purchaser. It is silent,

utterly silent, as to what the "account" is; it may have been an investment of defendant and the "account" is charged with the purchase price paid for the shares and would be "closed" by their sale. This would be the most likely interpretation of the meaning of the words; now, the other letter said in effect, We own the one hundred and seventy-two and one-half shares; Hand, in whose name they stand, is our agent. You must not transfer them without our knowledge and consent. "We wish to close the account for which this is collateral," a commission will be paid to you if you find a buyer. Here is the same expression, "We wish to close the account;" what account? The account showing our investment in the shares; we have charged these shares in an account with the price paid by us for them, and the shares are collateral to that account, and their sale is the only way to close it. Can that letter be construed otherwise by a Bank wholly ignorant of any pledge of the shares by Delamater & Co., made six years before to defendant? The evidence is all against any different view. See testimony of Matthew Griswold, the Bank's president (pages 60, 61), and that of Joseph I. Towne, the Bank's old cashier (pages 54, 55), and, showing the Bank's good faith; the name of defendant was actually entered in its books, by its cashier, as owner of the shares (pages 49, 59), and defendant, by its letter of October 14th 1897 (page 33)—after the failure—ratifies this view,

for it says, "The stock in the name of W. W. Hand belongs to this company." More, defendant's counsel conceded that the bank was absolutely ignorant of any pledge relation in its cross examination of witnesses Towne and Griswold. (Pages 54, 55, 60, 61.)

Bouvier defines estoppel as follows :—

> "An estoppel is the preclusion of a person from asserting a fact by previous conduct, inconsistent therewith on his own part, or the part of those under whom he claims."

Bigelow on Estoppel (fourth edition), 445, gives the following definition :—

> "Estoppel in *pais* may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged."

In the case of **Lewis vs. Carstair** (1843), 5 Watts & Sergeant's Rep., 205 (Pa.), which was a case at law (trespass), the court says, on page 209 :—

> "Whether an estoppel results from established facts is a question for the determination of the court, and the judge seems not to have gone far enough in submitting the question of equitable estoppel, so to call it, to the jury."

Again :—

> "As it can never appear whether a purchaser has been actually prejudiced by such acts, the possibility of injury to him is enough to raise an equitable estoppel by operation of law. His opponent is estopped from denying the right on whose existence he gave the purchaser reason to confide."

In **Turnipseed vs. Hudson** (1874), 50 Miss., 429, held—

"To establish estoppel *in pais* there must be:—

"1. An admission inconsistent with the evidence offered to be given or the claim offered to be set up.

"2. Action by the other party upon such admission.

"3. Injury to him by allowing the claims to be disproved. 14 Mo., 482."

Tarbell, J., delivering the opinion of the court, on page 435 says:—

"The propriety of this course is confirmed from the fact that estoppel *in pais* depends upon evidence and not upon the pleading.

"*Herman on Estoppel*, 560.

"*Bigtow on Estoppel*. 590.

"*Alexander vs. Walter*, 8 Gill, 240."

In **Mayer vs. Ramsey** (1876), 46 Texas, 271, *held*—

"An equitable estoppel may be proved under a plea 'not guilty' in trespass to try title."

In **Coleman vs. Pearce** (1879), 26 Minn., 123, *held*—

"Matter constituting an estoppel *in pais* need not be proven as such to enable a party to take advantage of the estoppel on the trial.

"*Caldwell vs. Augur*, 4 Minn., 156."

In **Vermont Copper Mining Co. vs. Ormsby** (1874), 47 Vt., 709, Barrett. J., delivering the opinion of the Court, on pages 713, 714, says:—

"If the purpose is to effect the legal title of Mr. Ormsby by equitable estoppel, that is as available in a court of law as in a court of equity. The kind of estoppel urged by the argument is only such as is familiar in courts of law as *estoppel in pais* in a court of equity. The purpose sought to be served by it in this instance, does not warrant resort to a court of equity."

In **Barnard vs. German American Seminary** (1882), 49 Mich., 444, it is *held*—

"Estoppels *in pais* are called equitable because they arise on facts that make their application just, and not because they are in any way limited to cases in equity; they are just as applicable in courts of common law."

In **Paxson vs. Brown** (1894), 27 U. S. App., 49, *held*—

"One who, by his acts or by his silence, when he ought to speak, intentionally or negligently induces another to believe certain facts to exist, and the latter acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby estopped from interposing such denial."

When the name of "W. W. Hand" was inserted by defendant in error in the blank assignments and powers, on January 10th, 1891, it was actually known to defendant that the only interest, other than its own, in the shares, was in the assignees for the benefit of creditors of Delamater & Co. **These assignees were trustees, acting under an order of court; whether trustees or not, they should have been notified of the transfer to Hand; but it was carefully concealed**

from them by the defendant in error, and the transfer to Hand was without their knowledge, consent, or ratification. (Pages 66, 67, 77, 81, 82, 87 to 92, inclusive, 96, 97.) It will be presumed that the purpose of concealment was to receive dividends from the assets of the assigned estate of Delamater & Co., for, if the assignees had known that this title to the shares had been taken by defendant and put in the name of its agent, dividends on defendant's claim against the assigned estate would have been refused; and, indeed, an action might have been maintained, at that time, by the assignees for damages for conversion of the shares, before default in payment of the note.

On March 16th, 1892, the Comptroller found that the capital of the Bank ($250,000) was impaired, and gave notice to the Bank, under section 5205, Revised Statutes, that in order to restore the capital, an assessment of twenty-five per cent. was necessary. This section, and amendment to it, reads as follows:—

> "SEC. 5205. Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, *by assessment upon the shareholders pro rata for the amount of the capital stock held by each;* and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until

otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four.

"SEC. 4 of the act of June 30, 1876, provides that if any shareholder or shareholders of a bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

By the provisions of this section and the amendment thereto, the payment of the assessment by the shareholder is voluntary and the only penalty for refusal or neglect to pay is a sale of a sufficient amount of stock necessary to meet the assessment of such shareholder at public auction after thirty days' notice.

In **Hulitt vs. Bell,** 85 Fed. Rep., '98, it is *held* :—

"An assessment to restore impaired capital under Revised Statutes, section 5205, is only enforceable by subjecting the stock of persons refusing to pay, and no action will lie against the stockholders personally."

The defendant in error elected therefore without the knowledge, consent or ratification of the assignees of

Delamater & Co. (its act being concealed from them) to voluntarily pay this assessment and $5750 (twenty-five per cent of $23,000, the par value of two hundred and thirty shares) was paid by it through Hand on September 16th, 1892. (See letter, page 54). It might have been better to have permitted the shares to be sold to pay the assessment in 1892. The Bank knew who paid it, because it was by defendant's check and because the president of the Bank, Mr. Griswold, had called at defendant's office and consulted with its officers in regard to the payment (page 61), and more, the Bank was informed by defendant in its letter of April 8th, 1897. (page 108), that the payment through Hand was its own act, for it says: "Since we have held the stock we paid an assessment and the number of shares reduced."

Defendant voted the shares through Hand, authorizing him to give proxies. (Pages 30, 31, 50, 52, 53, 54). On December 2d, 1892, defendant, through Hand, voted the shares in the affirmative of the proposition to reduce the capital stock $50,000 by the cancellation of that amount of stock held by the Bank and for a further *pro rata* reduction of twenty-five per cent., so as to leave the capital stock of the Bank $150,000. (Pages 52–53.) This reduction of the capital stock was made pursuant to section 5143, Revised Statues, which is as follows:—

> "SEC. 5143. Any association formed under this Title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the

amount required by this Title to authorize the formation of associations, but no such reduction will be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereto obtained."

This vote and act of the defendant in error, like all others, was without the knowledge, consent, or ratification of the assignees, who were thereby materially affected and was concealed from them, and it was known to the Bank to be the act of defendant, because Mr. Griswold, its president at the time, consulted with it in regard to the reduction of capital (page 61), and because the voting by Hand was confirmed and ratified by defendant in error in its letter to the Bank of April 8th, 1897. (Page 108.) Was not this conduct of defendant sufficient to cause the Bank to believe that it was the real owner of the shares and to justify the Bank's cashier in writing its name as owner of the shares in the stock ledger? (Pages 20, 21, 22. First assignment of error, page 149.)

The evidence is uncontradicted that about May 1st, 1895 (two years before Bank's failure), defendant in error told assignees of Delamater & Co. that it owned the one hundred and seventy-two and one-half shares transferred to Hand. John O. McClintock, Esq., one of the assignees, testifies:—

"We made known the object of our call, and this gentleman, whose name I do not recall, but who was repre-

sented to us to be an officer in charge of this matter, then stated to us that the certificates of stock which had been pledged by Delamater & Co. had been surrendered and that new certificates had been issued *to defendant company* in the name of W. W. Hand, an employee of the company. He also stated that an assessment had been called of twenty-five per cent. on this stock; that the stock had been reduced twenty-five per cent. and surrendered in pursuance of that call. That in addition thereto the defendant company had paid an assessment of twenty-five per cent. on the balance; that the assessment so paid had been paid, I think he said, in 1893; *that they owned the balance of the stock.* Having learned this much from the officer of the company we saw at once that there was no prospect of recovering from the stock for the creditors of Delamater & Co."

(Page 66. See also pages 65 to 76.)

George W. Haskins, Esq., the other assignee, testifies:—

"We called to adjust, if we could, the account and take up the stock. We were then informed by this gentleman, to whom we were referred and who was in the office, that the stock was transferred to Mr. Hand. Also that there had been an assessment on it of twenty-five per cent. which they had paid or arranged to stand—paid I think he said—and that in his opinion the stock was not worth the indebtedness, and we failed to make any arrangement with him." (Page 80.) "Yes; it was a surprise to learn that they had transferred it to anybody. In their communications to us on the subject the transfer had not been mentioned and we assumed that the stock remained as it was. That was our understanding when we went there." (Page 81.) "Neither of us authorized it" (the transfer to Hand, payment of assessment, and acceptance

of reduced number of shares), "or knew of it or consented or ratified it. We knew nothing about it at all. The conversation to which I referred above at the banking office of the defendant company was the first information or knowledge we had of it."

(Page 82.)

"Q. State whether or not the officer of the defendant company, whom you stated you thought was the vice-president of the company, stated to you at the meeting just referred to, that this stock was the property of the company.

"A. *He said it was;* that it had been transferred to Mr. Hand. He gave the information as an employee of the company; I do not know that he said anything more on the subject than as I have stated." (Page 82.) "It was upon his information that we based our application for the credit of $8000 in our final account (stating that the stock had been converted by the holder of the note, and said stock having been assessed to the amount of 25% of its face value, did not sell for enough to pay the note)." "That is the way he advised us, and our knowledge afterward concerning the deficiency of stock. There was a distinct statement by the officer at the time that it was not worth the face value of the note. And we understood from him that it had been converted."

(Page 83. See, also, pages 78 to 85.)

The assignees of Delamater & Co., as we have seen, were the only ones who had any possible interest in the shares, other than defendant, and defendant asserted its ownership to the shares to them, and, acting upon its representations, the assignees filed their final account, stating therein that the stock had been

assessed and converted and did not sell for enough to pay the debt, thus publicly abandoning forever all interest therein. **This final account of the assignees was confirmed by the Court of Common Pleas of Crawford County, Pennsylvania, on the first Monday of August, 1896 (a year before the Bank's failure). All interest in the shares of the assignees by this action, duly confirmed by the court, was forever ended, for the assigned estate paid but six per cent. of claims against it (page 73), and thereafter no one had any legal, equitable, real or beneficial interest in the shares except defendant.** When, therefore, defendant wrote to Bank, after this final account had been confirmed and the assignees discharged, in March, April and October, 1897 (pages 46, 108), it will be presumed—with full knowledge of the hopeless bankruptcy of Delamater & Co., and the final discharge of the assignees, and the consequent knowledge that every interest in the shares, other than its own, had been absolutely wiped out—that defendant intended to represent that it was the real owner of the shares when it said in its letters, "This company owns one hundred and seventy-two and one-half shares of stock in your Bank, standing in the name of W. W. Hand," and "The stock in the name of W. W. Hand belongs to this company," **and the Bank, its creditors and shareholders, as well as its officers, had the right to rely upon these representations, and it is impossible to say that the creditors were not prejudiced thereby, and the mouth of defendant, after failure of the Bank, is shut to now contradict its**

statement in an action by the Receiver for the collection of the assessment.

The registry of the shares on books of Bank by defendant in error in name of W. W. Hand, its agent, in contemplation of law, was a registry upon the facts in this case in its own name, and closes its mouth to contradict ownership just as if its own name had been registered. This is because of the legal identity of agent and principal.

In **Hubbell vs. Houghton** (1898), 86 Fed. Rep., 547, Putnam, J., delivering the opinion of the court, on page 533 says:—

> "Having come to this conclusion with reference to instances where shares of stock had been actually sold, the case for the plaintiff seems stronger, under the circumstances at bar; here there was no sale as between the holders of record and the defendant (Houghton); they (the holders) had been his agents, and, for all the purposes of this case, they were substantially the same as he; and, as against the rights of the creditors of the bank, the fact that the stock stood in their names, and not in his, on the books of the bank, ought to be regarded as of the very least importance."

And on page 548 says:—

> "The shares of the capital stock of the National Banking Association involved in this litigation were never entered on the books of the association in a way which would indicate ownership of them by the defendant. Nevertheless, when they were acquired by the parties in whose names they appeared on its books at the time it became insolvent, they were acquired by them as the agents of the defendant, and from the time they were

acquired the substantial proprietorship had always been in the defendant and the defendant had always held the corresponding stock certificates so indorsed that it was in his power to have the shares properly registered in his name at any time."

This case went to the Circuit Court of Appeals, for the First Circuit on error, 91 Fed. Rep., 453, and Aldrich, J., in delivering the opinion of that court, on page says :—

"It is according to principle that a burden of this character should rest upon the actual responsible owner, and, as a general rule, there is no safer party to pursue than the actual responsible owner, upon whom the ultimate liability must rest. Assuming that an assessment could have been successfully maintained against the agents who stood upon the bank records as owners, still the Comptroller might properly, in his discretion, elect to pursue directly the actually known owner. In doing so in this case, the Comptroller elected the most equitable of the legal remedies, and the one which sensibly avoided circuity of action and unnecessary litigation by striking at once at the sources upon which, if no exceptional circumstances exist, and necessary remedies were employed by the agents, the statutory burden must fall. It cannot be seen that any legal rule interposes in a situation like this, to prevent reaching a result directly. Neither can we see any prudential reason for pursuing an indirect legal course when a direct one is fairly open."

In **Davis vs. Stevens,** 17 Blatch., 259, Mr. Chief Justice Waite, delivering the opinion of the court, on page 261 says :—

"Under these provisions of law, it is contended that the registered shareholders alone can be charged with

statutory liability, and that an assignee of stock does not make himself responsible unless he accepted an actual transfer in his own name on the books. Stevens, by his transfer on the books, undoubtedly released the vendors from all future liability, because, as to them, the transfers were 'out and out,' in the language of the English cases, and not colorable only. They retained no interest whatever, and Elston, the registered transferee, although pecuniarily irresponsible, was capable in law of assuming the obligations of a shareholder. As between Stevens and Elston, however, Stevens was the real owner and Elston his authorized representative in the bank. As such a representative, Elston could vote the stock at elections, and receive and receipt for dividends. So too, he could sell and transfer the stock on the books, and such sale and transfer would, to a *bona fide* purchaser, pass the title, free from any claim of Stevens. Such being the case, I am unable to see how he (Stevens) can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent, especially authorized to hold for him the legal title. *Every principal is responsible for the obligations of his agent. The debt of the agent is the debt of the principal. By the rules of law which govern the relations of principal and agent the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens.*"

Case vs. Small, 10 Fed. Rep., 722, was a suit by the Receiver of the Crescent City National Bank to recover an assessment on fifty shares of stock, which were sold just prior to the failure of the bank through a broker and were purchased by I. K. Small, but at

the instance of Small were transferred on the books of the bank by the broker into the name of his sister, Miss E. M. Small. Upon these facts the court said:—

> "And finally, it is argued under section 5151, Revised Statutes, no other person can be made liable unless at some time or other he has been a stockholder of record and been held out to the world as such. The law seems to be settled now that the owners of stock are liable under that section.
>
> "At the same time, those persons who hold themselves or allow themselves to be held out as owners of stock are liable whether they own stock or not. It would seem that the rules relating to the ownership of national bank stock are about the same as applied to partnership. Real partners are liable, though not publicly known as partners, and persons who allow themselves to be held out as partners are liable, though they have no real interest."

In the four cases just quoted from, it does not appear that any of the persons liable for assessments held shares originally as pledgees standing in the name of agents, but defendant in this case, as in those cases, is, in legal effect, registered through its agent on the books of the Bank; and more, is estopped by its conduct and representations from denying that it is the real owner of the shares, and just as defendant would, undisputably, be liable, although pledgee, if actually registered as a shareholder, so, because of the legal identity of agent and principal, in contemplation of law, the shares upon the books of the Bank are now reg-

istered in the name of defendant, and it is estopped thereby to deny its liability to creditors, and the entry of the name of defendant by the Bank's cashier on the Bank's stock ledger (in place of W. W. Hand) as the owner of the shares, was doing simply what, in contemplation of law, had been done at the instant of transfer from Delamater to Hand, and it may be presumed that the official list of stockholders kept by the Bank, pursuant to section 5210, Revised Statutes, did have the name of defendant in it as the owner of one hundred and seventy-two and one-half shares, for this was the clear understanding of the Bank's officers, and they will be presumed to have done their duty, and the stock ledger containing the name of defendant as owner, and the stock certificate book, the stubs of which tended to show defendant's ownership, were books of the Bank from which the stockholders' list was made up. Indeed, the Bank would have been held liable in damages to defendant after notice to it of its ownership, if it had transferred the shares from Hand without its consent, or if it had paid dividends to Hand and not to it. Defendant, upon demand, had also a clear right to vote the shares.

W. W. Hand was without the slightest interest in the shares, never had custody of the certificates, and was simply and solely agent of defendant; he was not known to the assignees of Delamater & Co., Delamater & Co., or George B. and George W. Delamater; they never consented to or ratified the transfer to him,

or had any knowledge of it, and the case of **Anderson vs. Philadelphia Warehouse Co.,** 111 U. S., 479, relied upon by the courts below as a governing authority for this case, was decided upon facts entirely different. In that case there was a refusal upon the part of the Warehouse Company to accept the shares in its own name, and before the acceptance of the pledge there was an agreement between the pledgors, the Bank, and the pledgee that an irresponsible porter, in the employ of the pledgee, should hold the shares in trust for the purposes of the pledge, and in that case there was no representation by the Warehouse Company that it was owner of the shares, but a distinctly contrary representation; neither the irresponsible holder or the Warehouse Company claimed, nor were they at any time paid, dividends by the Bank, nor did they at any time vote the shares or take any control of the corporation. Kern or Blumer & Co., the pledgors, during the entire period, were paid by the Bank the dividends, and were permitted to control it by voting the shares. **It seems strange that the learned courts below have failed to distinguish the facts in the case at bar from those governing that case.**

Mr. Justice Miller and Mr. Justice Matthews filed a dissenting opinion in **Anderson vs. Philadelphia Warehouse Co.,** *supra*, page 485.

In the case at bar, defendant originally occupied the usual trust relation of pledgee—

1. To hold the legal title to the shares.
2. To sell in case of default in payment of note.
3. To return the shares unimpaired when note is paid.

It accepted no other trust relation, and it is well-settled law that a trustee cannot discharge himself of the trust accepted, **by his sole action; it must be by the knowledge, consent, or ratification of the *cestui que trust;* such trustee cannot, of his own motion, invest another with the trusteeship, nor transfer the discretion involved in such a trust, unless express authority is given in the writing, creating it.**

There was no such authorization here. W. W. Hand could not be a trustee, implied or otherwise, in this case, for the assignees of Delamater & Co., Delamater & Co., or George B. and George W. Delamater.

Perry on Trusts, Sections 274, 287, 408, 409.

As before stated, the legal effect of taking this title to itself before default in note was to make defendant mortgagee instead of pledgee; it was entitled to hold the title as well as the possession of the shares as mortgagee until the debt secured by them was paid, and not before default in payment of the note, did it have any right to make a sale of the shares so mortgaged, and by this transfer from the Delamaters it released George B. and George W. Delamater from all liability to creditors and substituted itself in their

stead as shareholder, with all the rights and burdens attached thereto.

In **Anderson vs. Philadelphia Warehouse Co.,** 111 U. S., 479 (1884), Mr. Chief Justice Waite delivering the opinion of the court, on page 683, says:—

> "It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only, and that, if a registered owner, acting in bad faith, transfer his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. *National Bank* vs. *Case*, 99 U. S., 628; *Bowden* vs. *Johnson*, 107 U. S., 251. It is also undoubtedly true, that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder."

Adding to what has just been quoted—

> "But it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner."

The court below put great stress upon the last quotation, and the defendant relies upon it for its defense to this action. It is a dictum, but it is not necessary for our argument to dispute this statement. **We confidently submit that the defendant in this case is not a "mere pledgee;" it at least became a mortgagee, and it *is* "registered" upon the books of the Bank in legal effect, because of the legal**

identity of agent and principal, and, further, because the cashier of the Bank did, in fact, enter its name in the stock ledger of the Bank as a shareholder.

In **Germania National Bank vs. Case**, 99 U. S., 628 (1878). The Bank loaned Phelps-McCullough & Co. $14,000, and one hundred shares of the Crescent City National Bank were pledged as security; the note was dated December 7th, 1872. A power of attorney was given to the cashier of the Crescent City Bank to transfer the stock to the Germania Bank in case of default in payment of the note by Phelps-McCullough & Co.; the note matured March 10th, 1893, and was not paid. The circulating notes of the Crescent City Bank went to protest March 17th, 1873, seven days after maturity of the note. Three days before its circulating notes were protested, to wit, on March 14th, 1873, and on the same day that payment of checks made upon the Crescent City Bank was suspended, the one hundred shares so pledged to Germania Bank were transferred on the books of the Crescent City Bank, by its cashier, under the power of attorney, from Phelps-McCullough & Co. to the Germania Bank. Immediately after this transfer, seventy-six of the shares were transferred by the Germania Bank to Waldo, one of its clerks, and on the next day the remaining twenty-four shares were so transferred. Waldo had no interest whatever in the shares, and there was an understanding that he would re-transfer them to the Ger-

mania Bank at its request. The cashier of the Germania Bank testified:—

> "We transferred because we are not in the habit of holding any bank stock. We did not want to have any bank stock in our name; that was the object."

If the power of attorney had not been executed to the cashier of the Crescent City Bank authorizing him to transfer to the Germania National Bank in case of default in payment of the note, it may be presumed that the stock would never have appeared for one moment in the name of the Germania Bank on the books of the Crescent City Bank; the shares would have been transferred to Waldo direct from Phelps-McCullough & Co. It is also to be noted in this case that on the very day this transfer was made the Crescent City Bank defaulted in payment of the checks of its depositors, and this must have been known to the Germania Bank. The facts in this case, with the exception of the failing condition of the Crescent City Bank at the time of the transfer, would be the facts in the case at bar if the stock had been transferred direct from Phelps-McCullough & Co. to Waldo, agent, at the instance of the Germania Bank. That case differs from the one at bar in the fact, also, that the Germania Bank did not represent that it was owner of the stock, as did defendant in case at bar. In the Germania Bank case, Mr. Justice Strong, in delivering the opinion of the court, on page 631 says:—

> "Such being the facts of the case, there can be no serious controversy respecting the principles of law ap-

plicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* vs. *Upton*, 96 U. S., 328, and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly* vs. *Storm*, 6 Hill (N. Y.), 624; *Roosevelt* vs. *Brown*, 11 N. Y., 148; *Holyoke Bank* vs. *Burnham*, 11 Cush. (Mass.), 183; *Magruder* vs. *Colston*, 44 Md., 349; *Crease* vs. *Babcock*, 10 Metc. (Mass.), 525; *Wheelock* vs. *Kost*, 77 Ill., 296; *Empire City Bank*, 18 N. Y., 199; *Hale* vs. *Walker*, 31 Iowa, 344. For this several reasons are given. *One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the reponsibilities of a stockholder.* This subject is well treated in Mr. Thompson's recently published work on "The liability of stockholders," where may be found not only a full collection of authorities, but a careful analysis of what the authorities contain. *Vide*, c. 13.

"When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps-McCullough & Co. ceased. We have, then, only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. *It certainly did not thereby divest itself of its substantial ownership.*"

The title to the shares in the case at bar in legal effect passed (1) from G. B. and G. W. Delamater to Delamater & Co.; (2) to defendant [and a contingent interest to assignees of Delamater & Co. (abandoned May 1st, 1895)], and (3) from defendant to W. W. Hand, its agent.

The facts in this case are much stronger in favor of the Receiver than the facts in *National Bank* vs. *Case*, *supra*.

In **Pauly vs. State Loan & Trust Co.** (1897), 165 U. S., 606, it is *held*—

> "(2) That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, if, by the direction or with the knowledge of the pledgee the shares are placed on the books of the association in such a way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts, and engagements of the association."

The case at bar is even stronger than is required to come within the rule thus laid down by this court, for the defendant had possession and custody of the certificates duly assigned with powers to transfer at any time, voted the shares, paid the call to make good impaired capital, accepted reduced number of shares in lieu of the full number pledged and for a number of years acted and represented itself to be the owner and was so entered upon the books of the Bank, and after the first Monday of August, 1896, a year before the Bank's failure (when the final account of the assignees

was confirmed), was the only one that had any possible interest in them.

No demand was made on the individual members of the firm of Delamater & Co. for the payment of this note after the failure of the firm in 1890. Under the laws of the State of Pennsylvania an action upon a promissory note is barred in six years from its maturity. This note matured January 17th, 1891. The Bank closed its doors on June 26th, 1897, more than six years afterward; during all this time and to the present no demand for payment has been made upon the Delamaters individually or as a firm, nor has the note been sued to judgment. On January 17th, 1897, several months before the Bank closed its doors, the claim against the Delamaters was barred by the Statute of Limitations of Pennsylvania. It is true that a dividend was paid from the assigned estate by the assignees of Delamater & Co., March 30th, 1893 (page 76), but the law is well settled that the limit of the statute is not thereby extended, because a new promise to pay is not implied when a payment is made by the bankrupt's representatives. The fact of the bankruptcy is itself a presumption to the contrary.

Christy vs. *Flemington* (1848), 10 Pa. St., 129;
Roscoe vs. *Hale*, 7 Gray (Mass.), 275;
Id. *Stoddard* vs. *Doane*, 388, 13 Gray, 381; 34 Barb., N.Y., 193; 17 Neb., 90; 16 Ohio St., 566; 58 Vt., 533; 1 R. I., 81; 2 R. I., 401.
Spangler vs. *Spangler*, 122 Pa., 358, approving *Christy* vs. *Flemington*, supra.

That an action to recover on the note of Delamater & Co., was barred on January 17th, 1897 (before failure of Bank), is important for the reason that in Pennsylvania it is a rule well stated in **Waterman vs. Brown,** 31 Pa. St., 161, that if the pledgor fails, for more than six years—rests upon his rights—to redeem his pledge, by an offer to pay debt, in a case like this where the pledgee has converted to his own use the pledged security in lieu of claim upon the note, the six year limit of the statute—the rule at law—will be adopted as the rule in equity and will bar recovery of the pledge. (See also **Hayward vs. National Bank,** 96 U. S., 611.) Therefore, on January 17th, 1897, under the laws of Pennsylvania, the limit of the statute barred any right of action existing in Delamater & Co. or its individual members to recover the pledged shares upon payment of debt just as it did the right of the defendant to sue the note to judgment against Delamater & Co. or its individual members, and on that day all rights of action growing out of the pledge of March 1st, 1889, had been obliterated between all parties thereto, except the assignees of Delamater & Co., and on May 1st, 1895, these assignees abandoned all their interest in the shares and so reported to the court, and the court in confirming their report finally discharged them on the first Monday of August, 1896, when all rights adverse to defendant were publicly and finally abandoned. At the time, therefore, defendant wrote the letters to

Bank on March 17th, 1897 (page 46); March 20th, 1897 (page 108); April 8th, 1897 (page 108), and October 14th, 1897 (page 46), every interest other than that of defendant in the shares had disappeared and it was in truth the real owner.

Respectfully submitted,

ASA W. WATERS,
Of Counsel for Plaintiff in Error.

REPLY TO BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

Since completing the foregoing brief, counsel for plaintiff in error have been handed that of learned counsel for defendant in error, and make reply thereto.

The following assignments of error relied upon by plaintiff in error for estoppel were partly or wholly omitted by mistake in the enumeration in plaintiff in error's brief (pages 46–52, inclusive), to wit:—

"9. That the said court erred in refusing to give to the jury at the trial of the above-entitled cause, binding instructions for the plaintiff in error for the amount of his claim (upon the law and evidence), being the third point of charge requested by the plaintiff in words as follows, to wit:"—

"3. You must find a verdict for the plaintiff for the amount of his claim." (Pages 153, 154.) (Page 133.)

"5. That the agreements as to facts and the matters therein contained and the evidence produced at the trial of the above-entitled cause are not sufficient in law for the said defendant to have or maintain its aforesaid judgment against the said plaintiff in error; the said defendant being thereby estopped to deny its liability for the assessment levied by the Comptroller of the Currency of one hundred per cent. upon the one hundred and seventy-two and one-half shares of the capital stock of said Keystone National Bank of Erie, with interest thereon at six per cent. per annum from the day that same was made payable, December 3d, 1897." (Page 151.) (Page 131.)

Plaintiff in error by express reference to particular assignments of error does not thereby wish to waive any one of his assignments.

It is claimed by plaintiff in error that upon all the evidence defendant in error is estopped to deny (1) its liability to Bank's creditors; (2) that W. W. Hand was its agent; (3) that it converted the shares to its own use; (4) that it was the real owner, or (5) to affirm that the Delamaters or their assignees were stockholders, directly or indirectly, liable to creditors.

Phila., Wilmington & Baltimore R. R. Co. vs. *Howard* (1851), 13 Howard, 307, and particularly from the opinion of Mr. Justice Curtis, on pages 335–337;

Dickerson vs. *Colgrove* (1876), 100 U. S., 578, and particularly from the opinion of Mr. Justice Swayne, on pages 580–584;

Insurance Co. vs. *McCain* (1877), 96 U. S., 84–86;

Bronson, Executor, vs. *Chappell* (1870), 12 Wallace, 681, and particularly from the opinion of Mr. Justice Swayne, on page 683;

Thompson vs. *First National Bank of Toledo* (1883), 111 U. S., 529;

Ewart on Estoppel (1900.)

The letter of defendant, dated October 14th, 1897 (page 33), informing the Bank that "the stock in the name of W. W. Hand belongs to this Company" is omitted from the statement of facts in defendant in error's brief. While written after the failure of the Bank, it plainly confirmed the truth of the impression it had made upon the Bank by its letters written before its failure. It is a ratification of its preceding correspondence.

An examination of the records and opinions in the cases relied upon in defendant's brief, shows that they do not sustain defendant's position.

We have already discussed **Anderson vs. Philadelphia Warehousing Co.** and **National Bank vs. Case** (*supra.*)

Pauly vs. State Loan & Trust Co. is a case where the defendant was registered as "Pledgee." Defendant there asserted no ownership of the stock, and the pledgors were officers of the bank at the time the loan was made, and it had notice of the transaction.

In **National Park Bank vs. Harman,** 79 Fed., 891, affirmed "Per Curiam," 172 U. S., 644. The record shows that the National Park Bank never, in the slightest way, claimed ownership of the shares to the failed bank, which was fully cognizant of the true transaction.

Wilson vs. The Merchants Loan & Trust Co. 98 Fed., 688, affirmed 183 U. S., 121 (because not properly brought for review to this court), is a case where the president of the insolvent bank is pledgor, and the defendant at no time represented itself to be the owner of the shares, but to the contrary, in all its correspondence asserted that it was pledgee only, and at no time took any part in the management of the bank itself or through Peterson. This was also true in **National Park Bank vs. Harman** (*supra*), and **Pauly vs. State Loan & Trust Co.** (*supra*), and further, there was a failure to show that the pledgor or his assignee did not expressly ratify the transfer of the shares to Peterson as well as the consolidation of the two banks. In the case at bar the evidence does show positively no knowledge, consent, or ratification by the pledgor or its assignees.

Robinson vs. The Bank, 94 Fed., 964, affirmed 180 U. S., 295, is a case where the stock always remained registered in the name of the pledgor; it was bid in at auction at a nominal price by the pledgee bank, but was never put in the pledgee's name, and was afterward, before failure of bank, tendered to the pledgors when they contended in a suit in Texas that

the stock belonged to them, and the sale was irregular by the pledgees, and this court held that upon these facts the pledgee bank was not liable, and that the pledgors were estopped to assert the bank's ownership of the shares. This case is irrelevant to the one at bar.

Matteson vs. Dent does not pass upon the question involved in the case at bar at all; it refers to the case of **Pauly vs. The State Loan & Trust Co.**, where the defendant's name was registered as "pledgee," as an exception to the rule holding pledgees, when registered, as shareholders.

The learned counsel for defendant in error, in his brief, apparently admits that the defendant in error upon all the evidence, is estopped to deny its liability as a shareholder to the creditors of the insolvent Bank, represented by the plaintiff in error, and simply rests his case upon the statement: "We respectfully submit that these are matters which are not properly the subject of consideration upon this writ of error. Parties are held in this court to a strict recognition of the functions of the court in error in proceedings at law. Abstract and general considerations of the rights of the respective parties have no place here. They who seek to reverse the judgment at law must point specifically to error in the record." (Defendant's brief, pages 34, 35.)

The estoppel *in pais* claimed by the plaintiff in error upon all the evidence in this case, we think, is properly before this court upon the record.

The action is one in "*assumpsit.*" (Page 4.) The defendant pleads "*non-assumpsit.*" (Page 12.)

There was, therefore, no necessity, because no opportunity, to plaintiff in error to plead the estoppel.

P. W. B. R. R. Co. vs. *Howard*, supra.

The estoppel upon all the evidence is a question of law for the court. In Pennsylvania this is a well-settled rule.

Lewis vs. *Carstairs*, supra;

Keating vs. *Orne* (1874), 77 Penna. State, 8ft, approving *Lewis* vs. *Carstairs;*

Ewart on Estoppel (1900), pages 189–191.

This question of estoppel *in pais* is, therefore, properly before this court in the case at bar, for, in addition to its being the rule in Pennsylvania, it is the rule and practice in this court.

The third point asked of the court by plaintiff in error was for binding instructions in his favor for the amount of his claim. This point was refused. (Page 118.) The consideration by the court of this point involves, therefore, a review of all the evidence under the law for estoppel *in pais.*

The plaintiff's first point (page 116), refused by the court, was based upon enumerated facts constituting an estoppel *in pais.* The same is true of the fifth point requested of the court (page 119), which was refused. Counsel for the plaintiff then and there excepted to the refusal of the court to affirm each of the points so refused and to each of the defendant in

error's points affirmed by the court, and also to the court's saying in the general charge "that the only question in the case is one of fact; that the burden of proof is upon the plaintiff as to the beneficial ownership of the one hundred and seventy-two and one-half shares registered on the books of the Bank in the name of W. W. Hand, and that portion of the general charge in which the court deals with the matter of the right of said defendant to put the stock in the name of W. W. Hand without the knowledge, consent, or ratification of the pledgors or their assignees," all of which exceptions were noted at the time and are fully set forth in the bill of exceptions, on page 120 of the record, also upon pages 14 and 15 of the record, where they are more fully set forth in the bill of exceptions. The charge of the court to the jury was on October 18th, 1900. (Page 113.)

The defendant in error also asked for binding instructions (page 120), and the court answered: "That point is reserved; I shall put it in this form: The court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim." The jury apparently regarded this as binding instructions in favor of the defendant and almost immediately brought in its verdict accordingly. Two days after the charge of the court, on October 2[illegible], 1900 (page 125), plaintiff in error moved for a new trial (pages 121–125, inclusive), among other reasons:—

"Because the verdict of the jury is against the law and the evidence." "Because the learned court erred in refusing to affirm the first point submitted by the plaintiff," (which point enumerated the facts constituting the estoppel *in pais*, &c.), and also for the following reasons:—

"*Tenth.*—Because the learned court erred in not refusing the sixth point submitted by the defendant, which was as follows:—

6. "Under all the evidence the verdict must be for the defendant."

The answer of the court to this point was as follows:—

"That point is reserved. I shall put it in this form—the court reserves the question whether there is any evidence to go to the jury in support of the plaintiff's claim."

"*Eleventh.*—Because the learned court erred in overruling the objections taken by the plaintiff to the answer of the court to the plaintiff's first, second, third, fourth, and fifth points; and also to the court's saying in the general charge that the only question in the case is one of fact, and also to that portion of the charge in which the court deals with the matter of the right to put the stock in the name of W. W. Hand, to the overruling of each and all of the objections on behalf of the plaintiff to the ruling of the court, the plaintiff then and there did except upon each of the

matters as hereinbefore stated, and exceptions were allowed to the plaintiff by the court."

"*Twelfth.*—Because the verdict of the jury was contrary to law." (Page 125.)

The question of estoppel *in pais* was fully argued to the court upon this motion for a new trial, who had then reserved the question whether there was any evidence to go to the jury in support of the plaintiff's claim. The motion for a new trial was overruled by the trial judge on December 7th, 1900 (pages 126, 127), and on December 24th, 1900, the bill of exceptions was signed and sealed by the trial judge, and filed, and on the same day judgment had been entered on the verdict (page 128); and also on the same day (December 24th, 1900) (page 136), the assignment of errors was filed (pages 128–136, inclusive) to the United States Circuit Court of Appeals.

The silence and negligence of the defendant in error, whether willful or not, in concealing from the assignees of Delamater & Co. the payment of the $5750, on September 16th, 1892, under the twenty-five per cent. assessment, made pursuant to section 5205, Rev. Stat., U. S., to make good the impairment of the Bank's capital was directly prejudicial to the assignees, for this payment was voluntary and the only penalty for non-payment would have been a sale of so many of the then two hundred and thirty shares as would be necessary to satisfy the assessment. If

the assignees had been advised at that time, it is not only possible, but probable, that they might have secured a sale of these shares that would not only have paid the debt of the defendant in error, but have left to them an equity for the creditors of Delamater & Co., and this voluntary payment by defendant, without the knowledge, consent or ratification of the Delamaters or their assignees, was an "investment" in the shares by it, unauthorized by the holders of the equity and in connection with defendant's allegation of ownership of the shares to the assignees on or about May 1st, 1895, and the consequent waiver by the assignees in their final account to the court, of any equity in the shares absolutely estops defendant in error to say that these assignees remained stockholders, beneficial or otherwise. These acts were prejudicial to their interests. It was prejudicial also to the depositors of the failed Bank that defendant in error, without any previous agreement with the pledgors and the Bank (as in the case of **Anderson vs. The Philadelphia Warehousing Co.**, *supra*) transferred the legal title out of the name of the Delamaters into the name of Hand, its own agent, because, as Mr. Justice Strong says in **Bank vs. Case,** *supra*, "by taking the legal title, he has released the former owner," and further, defendant, by holding itself out to the Bank as the owner of the shares in the name of Hand and expressly ratifying the payment of the assessment and the voting for the reduction of the capital stock by Hand, by its letters of January 24th, 1893 (page 32) (page

42), and April 8th, 1897 (page 108), so impressed the Bank with its ownership that its name was entered upon the books as the owner of the shares, and it must be presumed that as these were the books, as the evidence shows, from which the list of stockholders was made up, as required by section 5210, Rev. Stat., that depositors dealt with the Bank upon the credit of the defendant, who held one-ninth of its entire capital stock. This claim of ownership by the defendant in error, also estops it to affirm that the Delamaters or their assignees were owners, and the Bank, having accepted and entered upon its books defendant in error as the owner of the shares in the name of Hand, is estopped also to make any claim against the Delamaters or their assignees for the collection of the assessment.

The fifth assignment (page 131), just above quoted, very clearly designates the error complained of.

With the petition in error to this court was filed the assignment of errors and complaint as per Rule 8. (Pages 149–158, inclusive.) This assignment of errors includes those filed to the United States Circuit Court of Appeals.

Counsel respectfully calls this court's attention to the fact that it was necessary to submit the evidence in this case to the jury upon plaintiff in error's behalf upon depositions, as plaintiff's witnesses were beyond the jurisdiction of the court. The only witness that appeared upon the plaintiff's behalf, in person, was Mr. George H. Higgins, then Receiver.

There appear in the depositions numerous objections to the admission of testimony, and by mistake they were copied into the record. These objections were all waived by the defendant in error at the trial, with the exception of those ruled in its favor by the trial court and brought to this court for review, and contained in plaintiff in error's assignment of errors.

Respectfully submitted,

ASA W. WATERS,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

George C. Rankin, who succeeded George H. Higgins, Receiver of the Keystone National Bank of Erie, Plaintiff in Error,

vs.

The Fidelity Insurance, Trust and Safe Deposit Company, Defendant in Error.

October Term, 1902.
No. 178.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PAPER BOOK OF THE DEFENDANT IN ERROR.

COUNTER STATEMENT.

The undisputed facts in the case have not been stated in the paper book of the plaintiff in error with the fullness which is needed to give a clear understanding of the questions of law raised by the assignments of error. They are as follows:—

On November 15th, 1890, the defendant, the Fidelity Insurance, Trust and Safe Deposit Company, made a loan of $15,000 to the firm of Delamater & Co., of Meadville. (Record, pages 28–29.) This loan was in renewal of prior loans. For this loan Delamater & Co. gave to the Fidelity Company their sixty-day note, dated November 15th, 1890 (Record, page 102), and as collateral to secure the payment of the note, deposited two hundred and thirty shares of the capital stock of the Keystone National Bank of Erie, each share being of the

par value of $100. The shares thus deposited as collateral were in four certificates, one being for one hundred shares in the name of George B. Delamater, one for thirty shares in the name of George B. Delamater, and two for fifty each in the name of George W. Delamater. (Record, page 23.)

With the certificates of stock thus deposited, powers of attorney were deposited with the Fidelity Company, signed by George B. Delamater and George W. Delamater, respectively, in blank. These documents were in the usual form, containing a bill of sale, and also power of attorney to transfer, the name both of the transferee and attorney being blank, as is the custom.

On December 5th, 1890, the firm of Delamater & Co. made a general assignment for the benefit of creditors to George W. Haskins and John O. McClintock. (Record, page 63.)

On January 10th, 1891, The Fidelity Company having been informed of the assignment by Delamater & Co. for the benefit of creditors, sent to the Keystone Bank of Erie the original certificates deposited as collateral, and requested the bank to transfer the shares into the name of W. W. Hand. (Record, page 31.) W. W. Hand was a clerk in the employ of the Fidelity Company.

The Keystone Bank transferred the shares as requested into the name of W. W. Hand, and transmitted the new certificates to The Fidelity Company, who acknowledged receipt of the same in a letter of January 19th, 1891, saying (Record, page 31):—

"PHILADELPHIA, Jany. 19, 1891.

"*Keystone Natl. Bank, Erie, Penna.*

"GENTLEMEN: Your favor of the 17th inst. received enclosing certfs. for 230 shares of the bank stock registered in the name of W. W. Hand. We would like to have a bid for the stock if you know of a purchaser.

"Yours truly,

"CHAS. ATHERTON,
"*Treas'r.*"

The certificates issued in the name of W. W. Hand, as appears from the stock books of the corporation were dated January 15th, 1891. There was no receipt for the same on the stub of the stock book, but a memorandum thereon in the handwriting of the clerk of the Keystone Bank, as follows: "Sent to the Fidelity Insurance, Trust and Safe Deposit Company, Philadelphia, Pa., 1/17/91." (Record, page 22.)

On March 16th, 1892, the Comptroller of the Currency, finding that the capital of the bank was impaired, ordered an assessment of twenty-five per cent. on the capital of the bank. (Record stipulation, page 17.) The Fidelity Company, holding the shares of the bank as collateral, advanced the amount of this assessment thereon. This assessment on these shares amounted to $5750, and this amount was charged by the Fidelity Company on its books to Delamater & Co. as an increase of the loan. (Record, page 99.)

On December 2d, 1892, by order of the Comptroller of the Currency, acting pursuant to the provisions of section 5143, Revised Statutes of the United States, the capital stock of the bank was reduced from $250,000 to $150,000, divided into fifteen hundred shares of $100 each. By this reduction each prior holder of twenty-five shares received but fifteen shares.

Thereupon on January 24th, 1893, the Fidelity Company, as the holder of the certificates for two hundred and thirty shares which had been deposited with them as collateral for the loan of Delamater & Co., sent the certificates for these shares for exchange into the reduced number of shares. (Record, page 32):—

"PHILADELPHIA, Jany. 24th, 1893.

"*Keystone National Bank of Erie, Pa.*

"GENTLEMEN:—Enclosed you will find certificates 180–181 each 100 shares, No. 183, 30 shares of your Bank, to be exchanged in accordance with resolution of stockholders December 2d, 1892. You will please return the new certificates to this address.

"Very truly yours,

"CHAS. ATHERTON,

"*Treas'r.*"

The bank received these certificates, and on February 7th, 1893, returned to the Fidelity Company a certificate for one hundred and seventy-two and a half shares in the name of W. W. Hand.

The receipt of this certificate the Fidelity Company acknowledged in a letter of February 10th, 1893, as follows (Record, page 32):—

"PHILADELPHIA, Feb. 10, 1893.

"*F. V. Kepler, Esq., Cashier Keystone Natl. Bank, Erie, Penna.*

"DEAR SIR:—Yours of the 7th received with certificate for 172½ shares new stock of your bank.

"Very truly yours,

"CHAS. ATHERTON,
"*Treas'r.*"

On March 20th, 1894, Mr. Atherton, the vice-president of the Fidelity Company, addressed a letter to the bank, making inquiry as to any sales of this stock, which reads as follows (Record, page 32):—

"PHILADELPHIA, March 20, 1894.

"*Matthew Griswold Prest. Keystone National Bank, Erie, Pa.*

"DEAR SIR:—This Company holds 172½ shares of your bank registered in the name of W. W. Hand. We would like you to send us copy of your last statement and any other information in regard to the business of the Bank, and as to whether there is any sales of stock, and what price. We would like to sell our holdings, if marketable.

"Yours truly,

"CHAS. ATHERTON,
"*Vice-Prest.*"

No reply was received to this letter, and on April 4th Mr. Atherton wrote a further letter, which read as follows (Record, page 108):—

"*Mr. Matthew Griswold, Pres. Keystone National Bank, Erie, Pa.*

"DEAR SIR:—You will please answer my letter of March 20th asking for information in regard to the business of your bank. We would like you to send us a copy of your last statement published, also would like to know if there has been any sales of stock within the last six months, or what price was the last sold at. As we have a loan of $22,000 depending on the value of 172½ shares we desire the above information.

"Very truly yours,

"CHARLES ATHERTON,
"*Vice-President.*"

It will be perceived that while in the letter of March 20th, 1894, there was no information given to the Keystone National Bank of the circumstances under which the Fidelity Company held these 172½ shares registered in the name of W. W. Hand, in the second letter, of April 4th, 1894, it was distinctly stated that a loan of $22,000 depended on their value.

To the second letter above referred to, J. W. Kepler, the cashier of the Erie Bank, replied under date of April 7th, 1894 (Record, page 107), apologizing for the delay in answering and stating that there had been no change in the price of the stock.

There seems to have been no further correspondence between the Fidelity Company and the Keystone Bank until the Spring of 1897.

On March 17th, 1897, Mr. Atherton, vice-president of the Fidelity, wrote to the cashier of the Keystone Bank as follows (Record, page 33):—

"PHILADELPHIA, March 17, 1897.

"*F. V. Kepler, Esq., Cashier The Keystone Natl. Bank, Erie, Pa.*

"DEAR SIR:—This company owns 172½ shares of the stock of your Bank registered in the name of W. W. Hand. We should be much obliged for any information you can give us in regard to the business of the bank, and a copy of your last statement to the Comptroller. Do you know of any sales of the stock, and at what price sold? We are anxious to sell the stock to close an account. If you can put us in the way of finding a customer, we will pay the usual commission.

"Yours truly,

"CHARLES ATHERTON,
"*Vice Prest.*"

It appearing that Mr. Kepler has ceased to hold the office of cashier, on March 20th, 1897, Mr. Atherton wrote a letter in similar language to T. M. Lamb, who had succeeded Mr. Kepler as cashier. (Record, page 108.)

No answer having been received to this letter a further letter was written under date of April 8th, 1897, as follows:—

"*F. M. Lamb, Esq., Cashier Keystone National Bank, Erie, Pa.*

"DEAR SIR:—March 17th, I addressed a note to Mr. F. V. Kepler, supposing he was still cashier of your bank. He said he was not connected with the bank and referred me to you. On March 20th, I wrote you this company owns 172½ shares of the stock of your bank registered in the name of W. W. Hand. Since we have held the stock we paid an assessment and the number of shares reduced. We have no knowledge of the bank affairs. We would like to have a copy of the last Statement to the Comptroller and any other information in regard to the business of the bank you

will give us. Are there any market for the stock and at what price? We are anxious to sell this stock to close an account. If you can put us in the way of selling the stock we will pay a commission.

"Yours truly,

"CHARLES ATHERTON,
"*V. P.*"

In this last letter it will be perceived that there is again a reference to the fact that the stock was held as collateral as it was the desire of the bank to sell it "to close an account."

To this last letter Mr. Lamb, as cashier of the Keystone Bank, replied under date of April 14th (Record, page 107):—

"*Charles Atherton, Esq., V. P. Phila., Pa.*

"Enclosed find report of this bank March 9th, 1897. As regards sale of the stock, I think there would be a poor chance at the present time. Since our trouble of several years ago we have made no dividends, the condition of business being such that it has not been advisable to do so. Business is picking up in this locality. Should it continue we will get our share of it and be able to make dividends. Now then will be a chance for a sale of stock. I will keep this matter in mind and should I find a chance for a sale will let you know. I have been out of the City, thus the delay in answering yours of the 8th.

"Respectfully yours,

"T. W. LAMB,
"*Cashier.*"

On June 20th, 1897, the Keystone National Bank of Erie clased its doors (Record, page 109), and on July 26th, 1897, the Comptroller of the Currency appointed a Receiver of the Bank.

On November 3d, 1897, the Comptroller ordered an assessment of one hundred per cent. on the stockholders. (Record, page 18.)

This action was brought against the Fidelity Insurance, Trust and Safe Deposit Company to recover this assessment of $17,250 on the one hundred and seventy-two and one-half shares registered in the name of W. W. Hand.

The question which was submitted to the jury at the trial was, as stated in the charge of the court:—

> "Whether before the Keystone National Bank failed, the defendant company was the real owner of these shares of stock, or whether it continued to be the pledgee of the stock. Whether the stock had become theirs in the sense in which we use in ordinary speech the word 'owner' or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence."

And again, the learned Judge said:—

> "The whole subject as I regard it—for the present at least—is a question of fact, and that question I repeat is whether the defendant company, The Fidelity Trust Company, was at the time when this Bank went into the hands of the Receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters."

Upon the issue thus submitted, the jury found a verdict for the defendant. We are therefore justified in asserting that the jury have found specifically as a fact, that at the date of the failure of the Keystone National Bank of Erie, these one hundred and seventy-two and one-half shares of stock registered in the name of W. W. Hand were held by the Fidelity Company, the defendant, as collateral security for the loan made to Delamater & Co. on November 15th, 1890, and that the equity, if any, in said shares, over and above the loan was the property of Delamater & Co. or their assignees.

A motion for a new trial having been made, the learned judge who tried the case, in an opinion (Record, pages 126, 127), held that upon the facts which must be regarded as established by the verdict the case came within the rule settled by the Supreme Court of the United States in Anderson *vs* The Philadelphia Warehouse Company, 111 U. S., 479, and reaffirmed in Pauly *vs.* The Loan Company, 165 U. S., 606.

The plaintiff having taken a writ of error to the Circuit Court of Appeals for the Third Circuit, that court, composed of Acheson, Dallas, and Gray, Circuit Judges, in an opinion by Judge Acheson (Record, page 141), affirmed the judgment.

BRIEF OF ARGUMENT.

The action of the learned judge at the trial was so clearly in accordance with the established current of authority that it is difficult to present an argument without repeating what seems to be well-settled law.

Prior to Anderson *vs.* Warehouse Company, 111 U. S., 479, the *status* of a lender taking shares of stock in a national bank as collateral, and causing those shares to be transferred into the name of a clerk or employee of the lender, might have been open to question, but all doubts previously existing were removed by an opinion of Mr. Chief Justice Waite, which has never since been questioned.

In that case, Blumer & Co. obtained a loan from the Philadelphia Warehouse Company, and among other collaterals deposited two hundred and fifty shares of the First National Bank of Allentown. The warehouse company caused the shares to be transferred, and a new certificate was issued in the name of T. Charlton Henry, president of the warehouse company. About one week thereafter, the facts coming to the notice of the board of directors of the warehouse company, it was deemed inadvisable to have the shares registered in the name of their president, and they caused the shares to be again transferred and new certificates to be issued in the name

of Dennis McCloskey, an irresponsible person, a porter in the employ of the warehouse company. There was a correspondence in evidence showing that the transfer to the irresponsible porter was because the warehouse company did not wish to assume liability as a stockholder.

Upon these facts Chief Justice Waite delivered an opinion, as follows:—

> "It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock, is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only; and that if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. National Bank *vs.* Case, 99 U. S., 628; Bowden *vs.* Johnson, 107 U. S., 251. It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder, but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner."

In the case just quoted, as in the case before the court, there was no question of impending insolvency. In each case the shares stood in the name of the clerk for about seven years intervening between the transfer and the failure of the bank.

In this way the case is distinguishable from Bowden *vs.* Johnson, 107 U. S., 251:—

> "Where the holder of shares of stock in a national bank, who is possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible person, with the design of substituting the

> latter in his place and thus escaping the individual liability imposed by the provisions of section 12 of the Act of June 3d, 1864, c. 106, and transfers his shares to such person, the transaction is a fraud on the creditors of the bank, and the liability of the transferrer to them is not thereby affected."

The case is also distinguishable from National Bank *vs.* Case, 99 U. S., 629, where

> "A party who, by way of pledge or collateral security for a loan of money, accepts stock of a national bank, which he causes to be transferred to himself on its books, incurs immediate liability as a stockholder, and he cannot relieve himself therefrom by making a colorable transfer of the stock with the understanding that at his request it shall be retransferred."

The opinion of the court below is also in accord with the ruling of the Circuit Court of Appeals for the Second Circuit in National Park Bank *vs.* Harman, 79 Fed. Rep., 891. In that case the Park Bank made a loan to Christie and Janney, and received shares of stock in the Stock Growers' National Bank standing in the name of one Stebbins; blank powers of attorney accompanied the certificates. The Park Bank caused the certificates to be transferred into the name of Holbrook, a clerk in their employ, who was irresponsible, and had no interest in the transaction other than to hold the shares for the protection of the bank. The court by Wallace, Circuit Judge, said:—

> "The adjudications of the Supreme Court are controlling authority for several propositions applicable to the case in hand, which are as follows: (1.) The real owner of the shares of the capital stock of a national banking association may in every case be treated as a shareholder within the

meaning of section 5151. (2.) Any person who holds himself out as the owner of the shares, by allowing himself to appear as the registered owner thereof upon the books of the banking association, may likewise be treated as a shareholder within the meaning of that section. (3.) If the real owner of the shares transfers them to another person, or causes them to be placed on the books of the banking association in the name of another person, with the intent simply to evade the responsibilities imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed. (4.) If a person receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as a security for the debt due from the real owner to the creditor—doing so in good faith, and for the purpose only of securing payment of that debt without incurring the responsibility of a shareholder—he will not be treated as a shareholder within the meaning of section 5151. The case of Pauly *vs.* Trust Co. (recently decided by the Supreme Court), 17 Supreme Court, 565, after reviewing previous decisions of the Supreme Court upon the general question, affirms the latter proposition.

In the present case the defendant never became the owner of the shares, but remained, as it always had been, merely the pledgee thereof, and, as was pointed out by the opinion in Pauly *vs.* Trust Co., could not become the owner by selling

the shares to itself because of its fiduciary obligation to exercise the right of sale for the benefit of the pledgors."

This ruling of the Circuit Court of Appeals was affirmed in 172 U. S., 644:—

> *Per Curiam:* "Judgment affirmed with costs, on the authority of Pauly *vs.* State Loan and Trust Co., 165 U. S., 606."

In Wilson *vs.* The Merchants Loan & Trust Company of Chicago, 98 Fed., 688, it was held that

> "A pledgee of stock of a national bank with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security without intending to assume liability as a stockholder, cannot be treated as one and subjected to an assessment under No. 5151 Revised Statutes, on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt."

So, also, in Robinson *vs.* The Bank, 94 Fed. Rep., 964, the Circuit Court of Appeals for the Second Circuit held that a pledgee of stock in a National bank who sells it in accordance with the terms of the pledge, and becomes the purchaser, but never has it transferred on the books of the bank into its own name, is not liable for an assessment under section 5151 of the Revised Statutes.

In Matteson *vs.* Dent, 176 U. S., 521, Mr. Justice White recites the general rules controlling the enforcement of this liability as follows:—

> "As a general rule, the legal owner of stock in a national banking association—that is, the one in whose name stock stands on the books of the association—remains liable for an assessment so

long as the stock is allowed to stand in his name on the books, and, consequently, although the registered owner may have made a transfer to another person, unless it has been accomplished by a transfer on the books of registry of the association, such registered owner remains liable for contributions in case of the insolvency of the bank.

"The exceptions to this general rule so far as established by decisions of this court are: (1.) That where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded, and the real owner he held liable. (2.) That where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, those acts will operate a transfer on the books, and extinguish the liability, as stockholder, of the transferrer. (3.) Where stock was transferred in pledge, and the pledgee for the purpose of protecting his contract caused the stock to be put in his name as pledgee, and a registry did not amount to a transfer to the pledgee as owner."

And in Pauly *vs.* The Trust Company, 165 U. S., 606, the general rules applicable are fully stated as follows:—

"A creditor who receives from his debtor a transfer of shares in a national bank as security for his debt, and who surrenders the certificates to the bank, and takes out new ones in his own name, in which he is described as pledgee, and holds them afterwards in good faith as such pledgee and as collateral security for the payment of his debt, is not a shareholder, subject to the personal liability imposed upon shareholders by Revised Statute, section 5151.

"If one receives shares of the stock of a national banking association as collateral security to

him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibility of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151."

And Mr. Justice Harlan, at page 621, delivers an instructive opinion :—

"Does the statute, in letter or spirit, require that the word 'pledgee' appended to the name of the party to whom certificates 308 and 309 were issued, should be entirely ignored? Is the holder of such certificates in no better condition, in respect of liability as a shareholder, than if such list had imported absolute ownership in the transferee? The statute requires that there shall be kept, at all times, in the office where the business of a national banking association is transacted, and subject, during business hours, to the inspection of shareholders and creditors of the association, as well as of officers authorized to assess taxes under State authority, a full and correct list of the names and residences of all the shareholders of the association, and of the number of shares held by each. Section 5210. Manifestly one, if not the principal, object of this requirement was to give creditors of the association, as well as State authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts,

debts, and engagements. Referring to this provision this court said, in Waite *vs.* Dowley, 94 U. S., 527, 534, that the Act of Congress 'was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank.' And, let it be observed, the liability upon shareholders is to the extent of the amount of their stock at the par value thereof, 'in addition to the amount invested in such shares.' The word 'invested' plainly has reference to those who originally or by subsequent purchase became the real owners of the stock, and cannot refer to those who never invested money in the shares, but only received the certificates of stock, or it may be the legal title thereto, as collateral security for debts or obligations already or to be contracted.

"It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as the true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a Receiver. But this is upon the ground that by allowing his name to appear upon the stock lists as owner he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value. But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued were not in fact,

and did not assume to be, the owner of the shares represented by them, but was and assumed to be only a pledgee having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgor's obligation. Upon inspecting the stock registry or any list of shareholders or of transfers kept by the bank, creditors will know that they cannot regard a pledgee as actual owner. If the certificates in question had been extended so as to give the name of the pledgor, it would not be supposed that, upon any principle of justice or upon grounds of public policy, the pledgee could have been held to the liability imposed by section 5151 upon shareholders."

This review of the decisions shows that upon the main question the court below was clearly in accord with the current of authority. It only remains to review the twenty-one assignments of error to show that there is nothing in detail which requires a reversal.

We will take up the several assignments of error in their order :—

(1.) Record, page 149. In this assignment of error there is a commingling of that which occurred as shown by the bill of exceptions, with a mass of argument, which renders it difficult to determine just what the question before the court is. The assignment, however, is based upon the action of the court in refusing to admit certain evidence as shown in Record, pages 20, 21. From the bill of exceptions it appears that George H. Higgins, the Receiver of the bank, having been called, produced stock ledger of the bank. On page 96 of the ledger, written in ink, is the following: "1891—W. W. Hand, February 1, 1893, 25% assessment, $5,750. New stock, $17,250. Total $23,000." On the credit side of the ledger is "1891—January 15, 230 shares of stock, $23,000. Total, $23,000." In pencil memorandum ——

"MR. DALE:—I object to the offer of the pencil memorandum."

The witness then testified the book was now in the condition in which it had been handed to him by his predecessor receiver, and that no alterations had been made by him in it. The offer of the pencil memorandum is then renewed, Page 21.

"MR. DALE:—I object to the offer of the memorandum which is in pencil. At the top of the page in pencil are these words: 'Fidelity Trust and Safe Deposit Company, Philadelphia.' I object to that upon the ground that a pencil memorandum, entered upon the stock ledger of a corporation, over the name of the person who purports to be the registered stockholder, is not evidence tending to show that the person or corporation named in the pencil memorandum as the Fidelity Company—even though the Receiver of that bank may with entire correctness testify that the book was in that condition when it came into his possession—it is something which does not tend to show anything binding on us.

"MR. JOHNSON:—All I have to show is that the books came from the proper custody, and having shown that, whatever the books bear upon their face, to the extent they are evidence, is evidence. It is not like the producing of a contract which emanated from some other person. I am producing our own books, and producing them just as the custodian receives them.

THE COURT:—What effect do you say should be given to the pencil memorandums?

"MR. JOHNSON:—Whatever effect would appear from that entry upon the book.

"THE COURT:—What particular inference are you seeking to draw from it?

"MR. JOHNSON:—To show that, upon the books, appeared the interest of the Fidelity Company in that stock; that in connection with the name of

Hand was also that of the Fidelity Company, and that there was not an unequivocal admission on our books of W. W. Hand without an interest in someone else.

"THE COURT:—I understand the purpose of the offer is to show the Fidelity Company's title to the stock.

"MR. JOHNSON:—It is for the purpose of showing exactly what our books declare with reference to the stock and the Fidelity Company's connection with it.

THE COURT:—It is on that point, and you intend to draw the inference, in part from this memorandum, that the Fidelity Company is the owner of the stock.

"MR. JOHNSON:—I do not think I could do that, but I do want to exclude the inference that upon our books we made an unequivocal admission that no one but Hand was interested in it. There is a difference between that and my adducing from it affirmative ownership—that I am going to prove in a different way—and when I offer my books I offer them for the purpose of having them go for whatever is on them."

"MR. DALE:—I object to the offer of that entry upon the ground that entries in the books of the corporation, *per se*, are not evidence to establish the fact that any particular person is a stockholder. There may be entries in the books, and if it be shown that the person charged as a stockholder has had either direct or inferential notice, then the entry may be admissible. It may be competent to show the stub entry book, or their stock ledger, but only entries in the stock ledger which are directly pertinent to that which appears upon the certificate itself are competent evidence. Entries in the corporation books as such do not bind the stockholders. Therefore, having called for the certificate in the name of W. W. Hand, they pro-

duce a stock ledger, and entries kept in the regular course of business ; part of the regular chain of entries relating to that certificate I do not object to, but when there simply appears on that page a pencil memorandum which is no proper part of the chain of entries, then I do object to it; I do not know what inference will be sought to be drawn from it, but I object to it as something which we in no sense could be chargeable with.

"THE COURT:—For the present we will exclude this memorandum, with liberty to the plaintiff to renew the offer at a future stage of the case.

"MR. JOHNSON:—What does your Honor do with the books themselves? They have been offered in evidence without objection, and I was having him read from them.

"MR. DALE:—When a book is offered in evidence every entry which is part of the book as regularly kept is admitted.

"MR. JOHNSON:—All I want is that the record shall cut down or limit the admission of the books, so that I may have my record straight.

"THE COURT:—I exclude this testimony for the present, because I do not yet see any sufficient connection to make this entry evidence against the defendant. The mere fact that the name of the Fidelity Company is on this page is not sufficient to show that it is the owner of the stock. *Non constat*, if for some reason some notice was to be sent to them, they might have been trustees of this stock, or there might be other reasons why the entry is there. Later in the case it may become pertinent evidence. In the present state of the proof we will exclude this memorandum.

"(Exception noted for plaintiff.)"

From this extract from the bill of exceptions it will be seen that the first assignment of error entirely fails to present the question upon which the court acted. But waiving all technical questions, the court was clearly right.

The books of a corporation in themselves are not evidence against persons charged as stockholders to establish the fact of their ownership of stock.

Sigua Iron Company *vs.* Green, 104 Fed. Rep., 854; 88 Fed., 203;

Carey *vs.* Williams, 79 Fed., 906.

If, however, by evidence *aliunde* the defendant is shown to have received the certificate, the certificate book and its stubs and stock ledger may be admitted to show the details of the ownership, but under no circumstances does the rule admitting the books of the corporation as evidence against stockholders apply to anything on those books other than the regular entries, and an unexplained pencil memorandum whereby the name of the Fidelity Insurance, Trust and Safe Deposit Company was written on the same page in which W. W. Hand appeared to have been regularly entered as the stockholder was not competent as tending to prove a legal ownership of that stock by the Fidelity Company. The relationship of the Fidelity Company to the transaction was fully explained by the correspondence and the testimony of witnesses. To have admitted this pencil memorandum would have been error, as introducing something into the case calculated to mislead the jury.

(2.) Page 150. This specification also relates to the admission of certain evidence, and the assignment is not in accordance with the rules of the Circuit Court of Appeals for the Third Circuit or the rules of this court.

Rule 11, Circuit Court of Appeals:—

> "*Assignment of Errors.*—The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of

evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to *totidem verbis*, whether it be in instructions given or instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Which is a paraphrase of rule 21, pl. 2 (2), of this court.

It evidently refers, however, to the matters referred to on page 28, bill of exceptions. The question, the objection, the answer, and the ruling of the court were as follows:—

"By MR. DALE:—

"Q. When was the loan to Delamater & Company made? * * *

"Q. The loan for which the shares were given to which you have referred?

"MR. JOHNSON:—I object to that, because the witness testified he had no personal knowledge of the matter; that he never came in contact with the Delamaters; that he learned only from the officers of the institution, and therefore he is unable to testify to any fact as to the date.

"A. Not personal knowledge, from personal contact with Mr. Delamater; but I have every knowledge of it.

"THE COURT:—I understand the witness to testify that in the usual course of business he received the notes and collaterals with reference to the loan in question, and made certain entries in the books with reference thereto; also, that certain subsequent correspondence was had with reference to the loan. I think, therefore, he is

competent to answer the question as to when the loan was made.

"(Exception noted for plaintiff.)"

This extract from the bill of exceptions shows that the ruling of the court was based on the antecedent evidence of the witness, which showed that he had that personal knowledge of the transaction made as enabled him to state the date when the loan was made, even though he had no recollection of personally talking with Mr. Delamater on the subject.

(3.) Record page 150 relates to the action of the court in excluding certain testimony contained in the deposition of J. O. McClintock. The offer, the objection, and the rulings thereon will be found at pages 68, 69, and 70 of the bill of exceptions. It will be perceived that the court below went to the full limit in admitting the evidence offered for the plaintiff. It permitted the plaintiff to show that the assignees filed their account in the Common Pleas of Crawford County, on July 13th, 1896, and having charged themselves in the account which they filed as follows:—

"Equities in stocks and bonds pledged as collateral on loan unadjusted as follows: (*a*) $23,000 stock of the Keystone National Bank of Erie, pledged for a loan of $15,000. Appraised at $8,000."

That the assignees has credited these as follows:—

"Accountants claim credit for the item of $23,000 Keystone National Bank stock pledged for loan of $15,000 charged at $8.000."

and excluded proof that in this account the assignees had made this further statement:—

"Said stock having been converted by the holder of the note, and said stock having been assessed to the amount of twenty-five per cent.

of its face value, did not sell for enough to pay the debt for which it was pledged."

In excluding this memorandum entered by the assignees of Delamater & Co. in the account filed by them the court below was clearly right. It was a mere assertion of facts made by these assignees without the knowledge of the Fidelity Company, the defendant. There was no evidence that the attention of the Fidelity Company had ever been called to it, or that the Fidelity Company had in any manner acquiesced in it. It was a pure assertion of a stranger not made in the presence of either litigant, and as such had no probative force against the Fidelity Company. The language of the learned judge below in excluding this offer fully vindicates his action.

(4.) Record, page 151, relates to the action of the court below (Bill of Exceptions, page 70) in excluding proof that the Common Pleas of Crawford County had confirmed the account of the assignees. This also was *res inter alios acta*, and it was also inadmissible to prove the action of the Court of Common Pleas of Crawford County by the oral testimony of Mr. Haskins.

(5.) Record, page 151, needs no particular discussion. It refers to nothing in the record which this court can take notice of. It is simply an assertion that upon all the evidence the verdict should have been for the plaintiff. That proposition need not be here discussed.

(6.) Record, page 151.—The same remark applies to this assignment of error, concerning which we shall say nothing more.

(7.) Record, page 152, relates to the refusal of the plaintiff's first point. In this point the plaintiff undertook to state his version of the facts, and upon the finding of those facts by the jury to ask for a binding instruction. It assumes that from certain facts thus marshalled the conclusion inevitably follows that the Fidelity Company at the time of the closing of the

bank was the absolute owner of these shares. The learned judge who tried the case submitted that question to the jury under all the facts of the case, and directed the mind of the jury clearly and specifically to the issue to be determined by the jury. The point thus submitted by the plaintiff in its inadequate presentation of all the facts, and in its clearly inaccurate presentation of others, if it had been affirmed, would have led the jury into error. The conclusion that the Fidelity Company was the absolute owner was not the certain consequence of the existence of the suggested facts. The inaccuracy of the point is particularly disclosed in that part of it in which it assumes that in 1895 "the assignees of Delamaters called at the office of the corporation defendant, and upon being there referred to the proper officer thereof, were informed that the corporation defendant was the owner of said shares." An examination of the deposition in which Mr. Haskins, one of the assignees (Record, page 83), stated what took place at the Fidelity Company, shows that no such claim of absolute ownership was made to the assignee on behalf of the Fidelity. Mr. Haskins' version of what took place is as follows:—

> "We went into the office of the Fidelity Insurance, Trust and Safe Deposit Company, and made known our business stating that we wished to make such adjustment as we could, or some adjustment if possible, with reference to the stock of the Keystone National Bank which they held in payment of the note. Our proposition was to turn over stock at its face value to the amount of the note and have them turn over to us the excess and this gentleman to whom we had been referred and with whom we were holding the conversation informed us that the stock had been transferred and he immediately mentioned the name of Mr. Hand and said he was an employee of the company and that they could not entertain any such proposition and said that an assessment had been levied on the stock which they had paid and that the stock had been reduced and they

did not think the stock worth the value of the note. They did not turn any of it over to us." * * * (Page 84.)

"Q. When you proposed to withdraw a part of the collateral, was not the refusal to permit this based upon the ground that the value of the collateral did not warrant such a withdrawal?

"A. Partly. But that is the time that the answer was made that it had been transferred. When we made that proposition, the answer was that the stock had been transferred and he added, as I said a moment ago, the value of the stock, in his opinion, was not equal to the face of the note."

This deposition, offered by the plaintiff, clearly shows not any claim of ownership by the Fidelity Company when the accounts of the assignees were settled, but an assertion that the collateral was not equal in value to the debt, and that consequently the Fidelity Company declined to accept stock at par and deliver the excess to the assignees.

This information may have fully justified the assignee in claiming credit for the excess of $8000 with which they had been originally charged, but it does not tend to show that the equity, if in fact the value was there, was extinguished and if the Keystone Bank had not failed in 1897, and through good business the stock had increased, no one can pretend that this evidence would have tended to show that the Fidelity Company had become owner so as to have excluded the right of Delamater & Company and their assignees to the benefit of any excess after paying debt and interest.

(8.) Pl. 153, relates to the refusal of the plaintiff's second point. This point is based upon the idea that the act of the Fidelity Company in transferring the certificates into the name of Hand without express evidence of authority thereunto sanctioning the transfer, coupled with its subsequent action in advancing the assessment and submitting to the reduction of the capital, was equivalent to a conversion.

It is proper to consider these points separately. The transfer of the shares into the name of Hand was authorized by the very terms of the power of attorney which Delamater & Co. gave to the bank with the certificates. These powers of attorney were made by the then registered owners of the shares the name of the transferree and the name of the attorney was left blank to enable the pledgee to fill the same in and procure the transfer at pledgee's will. When shares of stock are pledged, the pledgee has the right, from the nature of the transaction, and without any specific permission given by the pledgor, to complete the legal title adverse to that of the pledgor. It is true that such legal title is subject to the pledgor's right of redemption, but all the analogies of the law as well as the custom of business sanction the act of the pledgee, in procuring a transfer of the shares out of the name of the pledgor, and when the pledgor delivered the powers in blank, not limiting the name to that of the pledgee personally, the transaction upon its face imports authority to use any name the pledgee may select; the whole transaction, however, always being subject to the pledgor's right of redemption and the pledgee's responsibility to return the collateral upon the payment of the debt. This view is recognized by the learned judge who tried the case in his opinion on the motion for a new trial:—

> "The case now before me comes precisely within this rule, except that there is no proof of an express agreement that the shares transferred to Hand on the books of the bank should be held as security for the debt due from the Delamaters, the pledgors and the real owners of the shares, to the Fidelity Company, the creditor and pledgee. It does not seem to me, however, that this difference is important, because the jury have found as a fact that the shares were always thus held by Hand as security, and that when the Fidelity Company caused the name of Hand to be inserted in the blank powers of attorney signed by the pledg-

ors, the company did so with the intention, not of converting the shares to their own purposes or of treating them as if the company was the real owner, but solely with the intention that Hand should hold them as trustee for all the parties concerned. This being the fact, and Hand's title being thus in reality a title in trust for both parties to the pledge, I think it should make no difference that the pledgors did not formally agree that the shares should be transferred. Even if they had refused to agree to the transfer, they have suffered no harm or injury, and it is difficult to see upon what ground they could be heard to complain. They are not complaining or seeking relief—certainly not in this suit to which they are not parties—but even if they themselves were complaining of the transfer because they did not agree to it expressly, I should still adhere to the opinion that I expressed at the trial, namely, that when they indorsed the certificates in blank and delivered them as collateral security to the Fidelity Company to hold as pledgee for the loan, the pledgors thus authorized the company to transfer the certificates to a third person to be held by him in accordance with, but not in opposition to, the terms of the contract of pledge. Hand did hold the shares, as the jury have found, in accordance with the original contract of pledge, and I think therefore that the transfer to him was impliedly authorized by the indorsement in blank and the delivery of the shares to the pledgee."

The other matters of fact relied on to establish a conversion are the payment of the assessment by the Fidelity Company and its submission to the reduction of capital, but these were matters where the Fidelity Company's action was not voluntary. The assessment of twenty-five per cent. and the reduction of the capital were the act of the Comptroller of the Currency. They were the conditions upon which the Keystone

Bank of Erie was permitted to continue in business. The Fidelity Company, holding the shares as collateral, not only by the right of self-interest in protecting the debt due to them, but also as the representative of the ultimate owner, were not only bound but justified in submitting to the action of the Comptroller. Their refusal to do so would have, at that time, destroyed the collateral which they held, and would also have destroyed the shares which they were holding for their debtor. Their action in thus protecting the collateral in no wise evidences an intent to convert.

(9.) Record, page 153, is that the court refused to give a binding instruction for the plaintiff. We shall not discuss this further. Our position on this point is sufficiently sustained by the authorities which we have cited, which were followed by the learned judge at the trial in submitting the issue to the jury.

(10.) Record, page 154, relates to the refusal of the plaintiff's fourth point. In this point there is a further reference to the action of the Fidelity Company in transferring the shares out of the name of Delamater & Co. into the name of Hand without proof of express authority so to do. This we have already discussed under the eighth specification. The authority to make the transfer was distinctly given in the power of attorney accompanying the certificates.

(11.) Record, page 154, to the refusal of the fifth point. There were no facts in evidence to justify the submission of any such point. As to the assertion by the defendant of ownership, the uncontradicted evidence in the case shows that this assertion of ownership was in connection with an accompanying assertion that it held them as collateral. As to whether the Fidelity owned the shares absolutely, or held them as collateral was the issue which the court submitted to the jury. An instruction in the form suggested in the fifth point would have been erroneous.

(12.) Record, page 154, is not in accordance with the rules. It fails to quote that portion of the charge to which exception is made.

> Rule 11 of the Circuit Court of Appeals. * * * When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. * * *

When the language of the court is read it will seem to be unobjectionable:—

> "The whole subject as I regard it — for the present at least — is a question of fact, and that question I repeat is whether the defendant Company, the Fidelity Trust Company, was at the time when this bank went into the hands of the Receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters."

Not only was the court correct in its general apprehension of what the issue in the case was, but it accurately stated the issue of fact for the jury. If there were any controlling questions of law in the case, the charge of the court to the jury was not the place to discuss such questions. Such questions are only properly raised by points, and, if the questions of law are controlling, by binding instructions, but an examination of this particular case shows that no such controlling questions of law arose in it. The instruction of the court was not only fair to the plaintiff in its submission of the issue of fact, but strictly accurate.

(13.) Record, page 154, fails to accurately quote anything which was said by the learned judge to the jury, although it

relates to a subject which was discussed in the charge. See rule of this court, to wit (4). What the judge did say will be found on page 115 of the Record, and was as follows:—

"It has been argued to you by the counsel for the plaintiff — and there is one point upon that subject — that there was no justification for the transfers to Hand without the consent of the Delamaters. I am not able to agree with that statement in its entirety. I think the assignment in blank by the Delamaters and the delivery of the certificates in that condition would be sufficient evidence of consent upon the part of the Delamaters that the stock might be used by the trust company in any way that was consistent with the original contract. It would, of course, give no authority to deal with the stock in any other way; but if there was, as there was undoubtedly, an ordinary collateral loan, this assignment in blank, accompanied by delivery of the certificates in that condition, would in my judgment be sufficient evidence of consent on the part of the Delamaters that the trust company might deal with the stock in any way consistent with that contract. If for any reason satisfactory to themselves they chose to have the stock transferred to the name of another person who was simply to hold the title in conformity with the original transaction until the loan was either paid or the transaction closed in some way, as for example by a sale of the stock under the power in the collateral note, I think, and I so instruct you, that the trust company might do so without any violation of their duty to the Delamaters. I may, indeed, say that this piece of evidence is another illustration like the two that I gave you before. The form of the transaction is not inconsistent with the view urged upon you by defendant, namely, that it was a collateral loan, neither is it incon-

> sistent with the view taken by the other side; and what inference should be drawn from it, I repeat again, is a matter for the jury to determine."

This language of the learned court is very different from the attempted abstract contained in the specification of error, and we are satisfied to quote the language of the charge as its own best vindication.

(14.) Record, page 155, also fails to refer to any specific lauguage used by the court at the trial. So far as it has any reference to the charge, what we have said in reply to the twelfth assignment of error covers all that we wish to say as to the fourteenth.

(15.) Record, page 155, is not covered by any exception taken at the trial, and not having been excepted to at the trial, is not now assignable for error. The only exceptions taken by the plaintiff are found near the foot of page 120, and there is nothing which by any construction covers the matter covered by the fifteenth assignment. If, however, an exception had been taken, the charge was strictly accurate. The court simply stated the rule that upon an issue of fact the burden is upon the plaintiff to satisfy the jury by the fair weight of evidence.

(16.) Record, page 155, fails to refer specifically to any language in the charge, but so far as we are able to judge, it covers the same ground referred to in the thirteenth specification, to which we have already fully referred.

(17.) Record, page 155, is to the affirming defendant's first point. We submit that this point was drawn strictly in accordance with the rules of law adopted by the Supreme Court in the cases which we have fully cited.

(18.) Record, page 155, relates to the affirming of the defendant's second point. As the plaintiff in the trial of the case

had emphasized the fact that in certain letters Mr. Atherton had referred to the Fidelity Company as the "owner" of these shares, it was proper for the court to call to the attention of the jury the fact that in cotemporaneous letters Mr. Atherton had fully explained the fact that their ownership was that of pledgee, and as the word "owner" is in itself a word of uncertain import in law, being used to cover not only absolute ownership, but the qualified ownership of a pledgee, it was right that the jury should have their attention called to these facts.

(19.) Record, page 155, relates to the court's calling the attention of the jury to the proper definition of the word "owner." The accuracy of the court's instruction is shown by reference to definitions from the Century Dictionary and Bouvier's Law Dictionary:—

> "OWNER: One who owns; the rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not; in a general sense, one who has or possesses. When used alone it does not necessarily imply exclusive or absolute ownership. One who holds subject to a mortgage or otherwise has only a qualified fee, is generally termed owner if he has a right to possession." Century Dictionary.
>
> "OWNER: He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right. See 18 S. W. Rep. (Tex.) 578; 21 Or., 339.
>
> "Although there can be but one absolute owner of a thing, there may be a qualified ownership of the same thing by many. Thus, a bailor has the general ownership of the thing bailed, the bailee the special ownership. See Cra. C. C., 83. The right of the absolute owner is more extended than

that of him who has only a qualified ownership; as, for example, the use of the thing. Thus, the absolute owner of an estate, that is, an owner in fee, may cut the wood, demolish the buildings, build new ones, and dig wherever he may deem proper for minerals, stones, plaster, and similar things, which would be considered waste and would not be allowed in a qualified owner of the estate, as a lessee or a tenant for life. The word owner, when used alone, imparts an absolute owner; but it has been held in Ohio that the word owner in the mechanics' lien law of that State, includes the owner of the leasehold as well as of the reversion, on the ground that any other construction would be subversive of the policy and intent of the Statute. 2 Ohio, 123." Bouvier's Law Dictionary.

These quotations show at least the usage in the use of the word "owner," and the qualifications which are annexed to it.

(20.) Record, page 156, relates to the reservation of a point which did the plaintiff no harm. The court refused the defendant's request for binding instructions, and reserved the point. As there was a verdict of the jury on the issue submitted in favor of the defendant, defendant's sixth point was *functus officii.*

(21.) Record, page 156, is irregular. The refusal of a new trial cannot be assigned for error.

On page 156 of the Record it appears that in addition to the assignments of error which were presented to the Circuit Court of Appeals the plaintiff in error seeks to formulate, under the head of third (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), (*i*), (*k*), certain propositions of law as reasons for a reversal of the judgment.

We respectfully submit that these are matters which are not properly the subject of consideration upon this writ of

error. Parties are held in this court to a strict recognition of the functions of the court in error in proceedings at law. Abstract and general considerations of the rights of the respective parties have no place here. They who seek to reverse the judgment at law must point specifically to error in the Record. Such error may be found in the admission of evidence, the refusal to admit evidence or inaccurate instructions to the jury. If such error occurred at the trial, he who seeks to take advantage of it must show the error complained of by a proper bill of exceptions incorporated into the Record and subsequently by proper assignments of error bring it to the attention of the higher court.

The matters which appear on pages 156, 157 and 158 of this Record under the nomination of "specifications of error" have no place there.

Having presented to the court our views upon the questions of law involved in this Record, and having called attention to the insufficiency of the several assignments of error, we now ask that the judgment of the Circuit Court and of the Circuit Court of Appeals be affirmed.

RICHARD C. DALE,
For the Defendant in Error.

Supreme Court of the United States.

No. 178.—October Term, 1902.

George C. Rankin, Receiver &c., Plaintiff in Error,
vs.
The Fidelity Insurance, Trust and Safe Deposit Company.

In error to the United States Circuit Court of Appeals for the Third Circuit.

[April 6, 1903.]

This was an action at law by the receiver of the Keystone National Bank of Erie, Pennsylvania, against the defendant company, as the actual owner and holder of 172½ shares of the capital stock of the bank, standing upon its books in the name of one William W. Hand, to recover an assessment upon the shareholders of one hundred per cent made by the Comptroller of the Currency pursuant to R. S. sec. 5151.

The facts of the case are substantially as follows: On November 15, 1890, Delamater & Co., a banking firm of Meadville, Pa., borrowed $15,000 of defendant company, in renewal of prior loans, giving therefor their note for sixty days, and as collateral security deposited 230 shares of the capital stock of the Keystone National Bank of the par value of $100 per share, standing in the name of the individual members of the firm. The shares were valued at the time at par, $23,000; the bank was in good credit, and for twenty-seven years had regularly, and was then paying, semi-annual dividends. With its certificates of stock thus deposited, powers of attorney signed by the individual holders of the stock were also delivered to the defendant. These documents empowered the defendant to transfer the shares—the name of the transferee and the attorney being blank.

Twenty days thereafter, and on December 5, 1890, Delamater & Co. failed and made a general assignment for the benefit of their creditors, and on December 17, defendant having received notice of the assignment, wrote to the assignees declining to renew the note, but offering to anticipate its payment and return the collaterals. It seems the assets of Delamater & Co. were insufficient for this purpose.

On January 10, 1891, defendant sent to the Keystone National Bank of Erie the original certificates, deposited as collateral, and requested the bank to transfer the shares to William W. Hand, a clerk in the employ of the defendant. Three days later, and on January 13, the bank paid a semi-annual dividend of two per cent, but it does not appear who received this dividend, which proved to be the last one paid by the bank. The transfer

was made on the books of the bank, and new certificates issued in the name of Hand, dated January 15, 1891, and were transmitted by the bank to the company, which acknowledged receipt of the stock, and stated that it would like to have a bid for the stock "if you know of a purchaser." Hand signed the transfer in blank on the back of these certificates, and in that form they were retained by the defendant. There was no receipt for the certificates except a memorandum in the handwriting of the clerk on the stub of the stock book: "Sent to the Fidelity Insurance, Trust and Safe Deposit Company, Philadelphia, Penn., 1/17/91."

Fourteen months thereafter, and on March 16, 1892, the Comptroller of the Currency, finding that the capital of the bank was impaired, ordered an assessment of twenty-five per cent on the capital stock to make good the deficiency. The assessment upon these shares amounted to $5,750. This amount was paid by the defendant and charged on its books to Delamater & Co. as an additional advance. Its cheque was sent to the bank in a letter signed by Mr. Hand.

On December 22, 1892, pursuant to R. S. sec. 5143, and with the approval of the Comptroller of the Currency, the capital stock of the bank was reduced from $250,000 to $150,000, divided into 1,500 shares of $100 each. Thereupon, and on January 24, 1893, the defendant sent to the bank the certificates for 230 shares, and on February 7 received the certificates in the name of Hand, for 172½ shares, being the reduced number. Hand signed a transfer in blank on the back of the certificates, and in that form they remained in the possession of the defendant. On March 20, 1894, the vice president of the defendant company addressed a letter to the bank stating that the company held 172½ shares of the stock registered in the name of W. W. Hand, and requesting a copy of their last statement and any other information regarding the business of the bank, and as to whether there were any sales of stock, saying "we would like to sell our holdings if marketable." No reply being received to this letter, the defendant company repeated its substance in another letter of April 4, stating that "as we have a loan of $22,000 depending upon the value of 172½ shares, we desire the above information." Several other letters were written to the same purport.

On June 20, 1897, the Keystone National Bank closed its doors, on July 26 the Comptroller of the Currency appointed a receiver, and on November 3 ordered an assessment of one hundred per cent on the stockholders. Whereupon this action was brought to recover an assessment of $17,500 on the shares registered in the name of Hand.

The case was tried before a jury, and the question submitted to them "whether before this Keystone National Bank failed, the defendant company—the Fidelity Trust Company of this city—was the real owner of these shares of stock, or whether it continued to be the pledgee of the

stock; whether the stock had become theirs in the sense in which we use in ordinary speech the word owner, or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence."

Upon the issue thus submitted the jury returned a verdict for the defendant, upon which judgment was entered, and the case taken to the Circuit Court of Appeals upon writ of error. That court affirmed the judgment. (108 Fed. Rep. 475.)

Mr. Justice BROWN delivered the opinion of the Court.

There being but little conflict in the testimony as to the actual facts, the question really is whether the court should have submitted the case to the jury, or instructed a verdict for the plaintiff.

By R. S. sec. 5151, "the *shareholders* of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements for such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares;" and by sec. 5234, the receiver may, upon order of the proper court, enforce this individual liability.

Most of the cases arising under this section have turned upon the question whether defendant was in fact the owner of the shares. In this connection the following propositions may be considered as settled:

1. That liability may be established by allowing one's name to appear upon the books of the corporation as owner, though in fact he be only a pledgee. (*Pullman* v. *Upton*, 96 U. S. 328.) Nor can the real owner exonerate himself from responsibility by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred. (*National Bank* v. *Case*, 99 U. S. 628; *Bowden* v. *Johnson*, 107 U. S. 251; *Stuart* v. *Hayden*, 169 U. S. 1.)

2. Stockholders of record are liable for unpaid installments, though in fact they may have parted with their stock, or held it for others. (*Hawkins* v. *Glenn*, 131 U. S. 319.)

3. A mere pledgee, however, who receives from his debtor a transfer of shares, surrenders the certificate to the bank and takes out new ones in his own name, in which he is described as "pledgee," and holds them afterwards in good faith, and as collateral security for the payment of his debt, is not subject to personal liability as a shareholder. (*Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606.) But it is otherwise, if he allow his name to appear on the book as owner, or being the owner, makes a colorable transfer of the stock. (*National Bank* v. *Case*, 99 U. S. 628.)

Three cases in this court are specially pertinent to the one under consideration, and we have little more to do than to point out the salient facts of each and determine by which one of them this case is controlled.

In *National Bank* v. *Case*, (99 U. S. 628,) it appeared that the Germania Bank lent $14,000 to the firm of Phelps, McCullough & Co., who, to secure the payment of the loan, pledged to the bank one hundred shares of the stock of the Crescent City Bank, with power, on non-payment of the note, to dispose of the stock for cash at public or private sale, without recourse to legal proceedings. At the same time a power of attorney was given authorizing a transfer of the stock to the Germania Bank. The note not being paid at maturity, a transfer was made to the Germania Bank on the transfer books of the Crescent City Bank. The stock was subsequently transferred to one of the clerks of the Germania Bank with an understanding between him and the officers of the bank that he should retransfer it at their request. It was held that, notwithstanding the transfer to the clerk, the stock remained subject to the bank's control, that the transfer was made to evade the liability of the true owners, and that as Phelps, McCullough & Co. had ceased to be the owners of the stock, the bank was liable. The liability was put by the court upon the ground that the stock was transferred to the Germania Bank upon the transfer books of the Crescent City Bank, and thereby the bank became subject to the liabilities of a stockholder, and that as a transfer of the stock to its clerk, Waldo, was colorable, it had not exonerated itself from that liability.

The case is distinguishable from the instant case by the fact that the stock was actually transferred to the bank upon the transfer books of the Crescent City Bank, which thus appeared as owner, and that the subsequent transfer to Waldo was merely colorable. There was also the further fact that the Crescent City Bank was in a failing condition when the transfer to Waldo was made, and there was no reasonable doubt that the defendant Germania Bank knew it, and made the transfer to escape responsibility. In the present case the stock was never transferred to the defendant, and the transfer to Hand took place within two months of the time of the original pledge, when the Keystone Bank was supposed to be perfectly solvent, and remained so for more than a year thereafter when the assessment of twenty-five per cent was made, the bank continuing in business until June 20, 1897, more than six years after the transfer to Hand.

In *Anderson* v. *Philadelphia Warehouse Co.*, (111 U. S. 479,) the law as laid down in the prior case was somewhat relaxed, and a tendency manifested to look more closely at the equities. In that case Blumer & Co. borrowed a sum of money from the defendant, and as security for the loan transferred 450 shares of stock of the First National Bank of Allentown standing in the name of one Kern, a partner in the firm of Blumer & Co. on the books of the bank, and had a new certificate issued in the name of one Henry, president of the defendant warehouse company. The fact of the transfer of this stock to its president was brought to the attention of the directors of the warehouse company, who deemed it inadvisable to

have the stock stand in the name of the president, and it was therefore transferred to one McCloskey, a porter in the employ of the company, and irresponsible. McCloskey never had possession of the certificate, and at the request of the warehouse company, gave a power of attorney for the sale and transfer of the stock, and shortly thereafter died. The stock was subsequently transferred to one Ferris, another employé, also irresponsible. Dividends were regularly paid on this stock to Kern, and the warehouse company never acted as a shareholder. It was held that, as there was no evidence of fraud or bad faith; as the warehouse company was never the owner of the stock, and never held itself out as such; never consented to a transfer of the stock on the books; never claimed dividends, or acted as a shareholder, or ever pretended to be anything but a mere pledgee, it was not liable. Said the court: "The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern, or Blumer & Co., who were always the real owners." It was held that, as the defendant promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose, and asked that the transfer be made to McCloskey, from that time the case stood precisely as it would, if the transfer had been originally made to him instead of to Henry, the president of the company. "All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment." The case differs from this only in the fact that here there was *some* evidence (enough to go to the jury) that defendant had held itself out as the owner of the shares.

In *Pauly* v. *State Loan & Trust Co.*, (165 U. S. 606,) the stock which was delivered to the defendant as collateral security was reissued, and new certificates issued to the defendant as "pledgee." It was held that, as the stock book gave information that the defendant held the stock as pledgee only, it was not liable to an assessment. See also *Robinson* v. *South. Nat. Bank*, (180 U. S. 295;) *Nat. Park Bank* v. *Harman*, (79 Fed. Rep. 891;) *S. C.*, (172 U. S. 644.)

There is no doubt whatever that the defendant originally took blank transfers of the certificates of stock in question as security for its loan to the Delamaters; that at that time the stock was worth its face value, $23,000; had paid dividends for twenty-seven years prior thereto, and was in good credit. To charge the defendant with liability as a shareholder it must be made to appear that it had either become the owner of the shares in fact, or had held itself out to be the owner, and thereby estopped itself to deny its liability as such.

The first change in its attitude toward the stock took place within two months after the original pledge, and was caused by the failure of the Delamaters, which occurred within twenty days after the loan was made. The

change consisted in sending back, January 10, 1891, the original certificates, and requesting the bank to transfer the shares to Hand, which was done. Defendant evidently did not then intend to become the owner of the stock, as immediately after receiving notice of the failure of the Delamaters the vice president of the company addressed a note to them, or their assignees, calling attention to the note and the pledge of the stock, and saying that if they were prepared to anticipate the payment of the note and have the collateral returned, they would be glad to so arrange it; and in a further letter of May 5, 1891, to the Delamaters, he notified them that the note was secured by the Keystone Bank stock, and "if we cannot secure payment for the note and interest, I have to notify you that we shall proceed to sell the collateral at auction." It also appears that on July 7, 1892, the vice president of the company addressed a letter to the auditor of the Delamater estate, notifying him of their claim against that estate upon the note for $15,000, and stating that the company held the shares of the Keystone Bank as collateral for the loan. Thereafter, and on March 30, 1893, the company received a dividend of $795.60, to which it was undoubtedly entitled as pledgee.

Even so late as 1894 the vice president of the defendant company addressed a note to the Keystone Bank, requesting information regarding their business; whether there had been any sales of the stock and at what price, and saying that "as we have a loan of $22,000 depending upon the value of 172½ shares, we desire the above information." It is true that the defendant in 1892 paid an assessment of $5,750 upon this stock, but the amount was charged to the Delamaters as an additional advance, and was evidently paid to save its interest in the stock from forfeiture. R. S. sec. 5205 as amended in 1876 (19 Stat. 64.) It is not easy to see how the defendant could have done otherwise than it did without prejudice to its own rights, as well as to the rights of the assignees of the pledgors.

It is also evident that the assignees of the Delamaters treated the interest of the defendant in the stock as a mere pledge, since in their account filed in the Court of Common Pleas of Crawford County, July 13, 1896, they charge themselves in the account as follows: "Equities in stocks and bonds, pledges as collateral on loan unadjusted, as follows: (*a*) $23,000, stock of the Keystone National Bank of Erie, pledged for a loan of $15,000, appraised at $8,000." Proof was offered that in this account the assignees had made another entry, "said stock having been converted by the holder of the note, and said stock having been assessed to the amount of 25 per cent of its face value, did not sell for enough to pay the debt for which it was pledged." This memorandum was excluded, and properly so, by the court below, inasmuch as it was a mere assertion of fact made by these assignees without the knowledge of the defendant. The company could not be bound by a statement thus made by these assignees

without its knowledge or acquiescence. Again, it was obviously untrue, as the stock had never been sold. Evidently all that was intended by the word "converted" was that the stock was not worth enough "to pay the debt for which it was pledged." There can be no doubt that defendant would have been willing at any time to surrender the stock upon payment of the debt, and that it retained it simply because it was forced to do so.

It is also true that a number of letters were written during the time the defendant held possession of its certificates, in which it made inquiries as to the value of the stock, the number of sales made, and spoke of itself as holding or owning the stock which it desired to sell, and that Hand once or twice voted the shares by proxy; but the bank clearly could not have been misled, as the nature of such ownership was shown in the letter of April 4, 1894, in which they spoke of a loan of $22,000 depending upon the value of 172½ shares, and repeatedly thereafter, and as late as April, 1897, said they were anxious to sell this stock "to close an account" for which it was collateral.

If such representations had been made either by a formal entry upon the books of the bank or to the public, or to any one who could have been prejudiced by them, defendant might be held to be estopped, but as they were made to officers of the bank, who understood perfectly the capacity in which the defendant retained the stock, it was properly held to be a question for the jury.

Plaintiff also offered to show in the stock ledger of the bank over the name of W. W. Hand, in an account opened with him at the request of the defendant, a pencil memorandum at the top of the page in these words: "Fidelity Trust and Safe Deposit Company, Philadelphia." As it does not appear who made this memorandum, when or for what purpose it was made, or what it was intended to indicate, it was properly excluded from the consideration of the jury. It was probably explanatory of the fact that correspondence with regard to Hand's account was kept up with the defendant company. It had no tendency, however, to show anything inconsistent with defendant's position as pledgee of the stock As the stock stood in Hand's name, the entry had no tendency to prove ownership in another. (*Carey* v. *Williams*, 79 Fed. Rep. 906; *Sigua Iron Co.* v. *Greene*, 104 Ibid. 854.)

The fact that the certificates were put in the name of Hand, though calculated upon its face to awaken suspicion, wrought no material change in the situation. If defendant were in fact the owner of the shares, it could not avoid liability by listing them in the name of another. (*National Bank* v. *Case*, 99 U. S. 628.) If it were the pledgee, it had the option of listing these shares in its own name as pledgee; (*Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606;) or in the name of another and irrespon-

sible party, even though this were done for the purpose of avoiding liability. (*Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479.) The creditors were not injured, since if the exact truth had appeared upon the face of the certificates, by registering the shares as pledgee, they would have had no recourse against the defendant. Upon the other hand, if defendant had really owned the shares, it would have been a fraud to list them in the name of Hand. Perhaps it would have been less open to criticism to have listed them in its own name as pledgee, but as its failure to do so under the theory of the defendant that it was in fact the pledgee, misled no one, it should not be held liable for what was done in good faith and with no intent to defraud.

The case then really turned upon the actual ownership of the shares, and this question was properly left to the jury as one of fact. Although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury. (*Brown* v. *McGran*, 14 Pet. 479.) In that case it was said by Mr. Justice Story that "there certainly are cases in which, from the different senses of the words used or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects, and intentions, and agreements of the parties, are often to be arrived at only by allusion to circumstances which are imperfectly developed." This case is specially applicable to the one under consideration, inasmuch as plaintiff relies chiefly upon the fact that defendant, in its correspondence with the bank, spoke of itself as owning or holding the shares standing in the name of Hand. Under the circumstances, it is entirely possible that the word "owner" may have been used in its ordinary sense, or as representing a pledgee upon whom the ownership of the shares had been cast by the failure of the pledgor, and the depreciation of the value of the shares to an amount insufficient to pay the note. It can hardly be possible that the statute was intended to impose a liability upon a pledgee, who had taken the shares as collateral security and, through the failure of the pledgors, had been forced against its will into the position of ownership. Such a result might operate to destroy altogether the possibility of raising money upon the deposit of national bank shares as collateral. See also *Fagin* v. *Connoly*, (25 Mo. 94;) *Prather* v. *Ross*, (17 Ind. 495;) *Roberts* v. *Bonaparte*, (73 Md. 191;) (*Macdonald* v. *Morrill*, 154 Mass. 270.)

This case could only have been withdrawn from the jury upon the theory that, taking all the testimony together, there could be but one reasonable

interpretation put upon the conduct of the defendant with respect to these certificates. Such, in our opinion, is not the case. The fact undoubtedly was that the defendant did not intend to impose upon itself the statutory liability of a shareholder, and considering that it had not only lost its original debt of $15,000 (less a small dividend) by the failure of the Delamaters, as well as the additional assessment of $5,750 paid to save the shares from forfeiture, that there was no evidence of fraud or double dealing in its conduct, and that its liability was purely a technical one, it was not unnatural for the jury to require that such liability should be clearly established, before imposing upon it an additional burden of $17,250, for which it had received no possible consideration.

Some stress is laid by the plaintiff upon the fact that neither the Delamaters nor their assignees ever gave their consent to the transfer of the stock to Hand, but as the power of attorney originally given upon the deposit of the stock expressly authorized such transfer, and the rights of the defendant could only be protected in that way, there is no force in the objection, particularly in view of the fact that neither the Delamaters nor their assignees complained of such transfer. Being an act which it was authorized to take as pledgee, it cannot be made responsible as owner therefor.

There was no error in the action of the Court of Appeals, and its judgment is therefore

Affirmed.

Mr. Justice HARLAN dissented.

True copy.

Test:

Clerk Supreme Court, U. S.